THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, JANUARY 8, 1875. { Hon. JOHN F. DILLON, Contributing Editor.

TWENTY PAGES.—The unusual amount of space which is occupied in this number with the separate opinion of Mr. Chief Justice Roberts of the Supreme Court of Texas, in the case of Keuchler v. Wright, induces us to add four extra pages of reading matter. While we are on this subject it is perhaps proper to say, that an opinion prevails to some extent in Texas, that not only the majority opinion in Bledsoe v. The International Railroad Company (1 CENT. L. J. 401) but also this separate opinion was conceived in a spirit of hostility to railroads. It is scarcely necessary to sugest that there is no connection between a railroad and the question of constitutional law discussed in these two cases. We omitted to state in our last issue that the case of Keuchler v. Wright was argued before a full bench, composed of the following regular judges: Hon O. M. Roberts, Chief Justice; Hons. R. A. Reeves, T. J. Devine, G. F. Moore and R. S. Gould, Associate Justices.

WRITTEN OPINIONS IN FRIVOLOUS CASES.—In Missouri there is a law requiring the judges of the Supreme Court to render written opinions in all cases determined by them. This law may be founded in wise policy, and it may not. If the integrity of the judge is not to be trusted; if they need to be hedged about and hampered with "checks" and "safeguards;" and if this is a check or a safeguard;—then it is a wise law; otherwise it is a foolish one. We presume they have such a law in Pennsylvania; for we find in the columns of the Legal Intelligencer a great many "*per curiam*" opinions in frivolous cases; and which, being frequently published without a statement of the facts, are unintelligible. For instance the following is the opinion in McCullough v. Betts, 31 Leg. Int. 405:

> It is quite possible the oath taken to procure the certiorari in the court below was sufficient. But it is unnecessary to decide this point, as, by the record before us, we discover no fatal error in the proceeding. The judgment must therefore be affirmed. Judgment affirmed.

So likewise we find in Fletcher v. Blakeley, on the same page of the same journal, the following opinion, *per curiam*:

> The affidavits of defence in these cases are insufficient. These notes were sent to McVay & Co. for collection, and the notice of this fact, which appears in the indorsement, and is averred in the plaintiffs' affidavit of claim, is not sufficiently denied. Judgment affirmed.

Now it may be well for the judges in affirming the judgment in frivolous appeals, as these probably were, to endorse on the paper the nature of their judgment, and, briefly, the reasons therefor; but it surely taxes the patience of the profession to have such stuff printed.

Our Special Contributors.

We expected to be able to announce in our last number a list of editorial and other contributors, whose services we have secured for the coming year, but our time has been so much engaged with other matters that we have not been able to conduct the necessary correspondence to enable us to publish a full list. We are able, however, in this issue to announce a partial list, and trust to be able to announce several additional names hereafter.

Edmund T. Allen, Esq., a leading bankruptcy practioner of St. Louis, will conduct a column on the law and practice of bankruptcy. The law is an applied science; and the advantage of confiding a special department, like bankruptcy, to a lawyer in full practice in that department, will be readily appreciated by our readers.

Hon. James O. Pierce of Memphis, who some years since occupied the bench of the Law Court of that city with great acceptability, will from time to time contribute articles and notes to cases on the law of insurance, and also upon other subjects. Our readers have already been favored with several contributions from his pen; and we need not repeat what we have already said of him, that he is a careful and attentive student of legal questions, and a practiced and judicious writer. As Judge Pierce devotes special attention to the law of insurance, his contributions on that subject will, we doubt not, be of exceptional value.

Franklin Fiske Heard, Esq., of Natick, Mass., author of Precedents of Indictments, Curiosities of the Law Reporters, etc., will also be occasionally heard from by our readers. Mr. Heard has a sort of roving commission, and we cannot promise what the subjects of his contributions will be; but we can assure our readers that they will be interesting.

Hon. S. J. Thomas of Boston, will likewise occasionally drop in upon our readers in one of those interesting letters signed "Pelham." As in case of Mr. Heard, we cannot forecast what the subjects of these letters will be; but our readers know that they will not be dull nor too long:

> "For there's one rare, strange virtue in his speeches—
> The secret of his mastery; they are short."

Several other legal writers whom we are not authorized to announce as regular contributors, will remember us occassionally, among whom we may mention Hon. Francis Hilliard and Melville M. Bigelow, Esq., of Massachusetts; John F. Baker, Esq., of New York City; J. Alexander Fulton, Esq., of Delaware, and Hon. Marshall D. Ewell, of Michigan, editor of the 4th edition of Blackwell on Tax Titles.

A large number of gentlemen have been secured to act as special correspondents, with the view of furnishing us with timely information of the decisions of the courts of their respective states; but we are afraid to attempt to quote this list from memory, for fear that we may omit some that would prefer to be mentioned, or mention some that would prefer to be omitted.

We have hitherto found it to our interest to place our chief reliance for leading judicial opinions upon the judges themselves; and we shall therefore take the liberty of adding every judge, or at least every *good* judge (this means you, Judge,) of the federal courts and state courts of last resort to our list of contributors; "reserving the right to reject any and all bids."

The Literature of the Law.

The controlling spirit of our time and country is a restless and indomitable desire to "get on in the world," to prosper, to grow rich and powerful, to attain position and distinc-

tion, to rise above our fellows in all that pertains to material and social advancement and preferment, with slight regard to the more kindly relations and amenities of life, and with too little dependence upon the more solid and enduring foundation of a cultivated mind and well-trained intellect, whereon we may securely build the superstructure of success.

This spirit of enterprise is encouraged and intensified by that necessity for constant, unremitting effort to provide for themore direct concerns of life—that individual, personal and inexorable struggle for existence which is the common lot of mankind.

The legal profession in this country is peculiarly subject to the operation of this spirt of ephemeral progress, because the possibilities of reaching the highest positions of honor and distinction are supposed to be greater in this than in any other calling or profession; and it being the common impression that the shortest path to political preferment lies through the ranks of this profession, the attractions it affords to aspirants for such preferment, as a means thereto, are great and varied.

For this reason, and for others needless to mention here, there are drawn into the ranks of the profession many who are not fitted for it in any sense, many whose sole object is to use it as a stepping-stone to what they are pleased to consider a higher level, and very many who, though naturally capable of achieving its best rewards and highest honors, fail to do so from inherent defects of education, often coupled with the disadvantage of enduring a constant strain upon the faculties in meeting the exigencies of the hour, and earning daily bread for themselves and their families, without the possibility (as they persuade themselves) of repairing as they proceed, the defects and deficiencies of their primary preparation for the bar.

One of the most common and deplorable of these deficiencies is the lack of due cultivation in, and, indeed, the almost universal ignorance of, and indifference to, the principles and history (ancient as well as modern), of the science of government and the jurisprudence of the nations of the world.

The average law-student, on application for admission to the bar, passes a fair examination upon the statutes and decisions of his own state, the fundamental principles of law as learned from Blackstone and Kent, and the history and *status* of the different leading branches of the law, as learned from the various text-writers on special subjects; but what does he know of the labors of Bracton and Britton, or the Institutes of Justinian, the laws of Julian, the patient researches of Guizot, the exquisite reasoning of St. Germains, or the constant and unending progress and growth and development in the entire body of jurisprudence of the nations of the world, from the time of the Patriarchs to the date of Magna Charta? Even thence, the history of the growth and perfecting of our own system, as we have derived it from the English, as well as the lives and writings of its expounders and disciples, is a dim and uncertain and unprofitable mythology to him, which is pronounced "of no practical benefit for him to enquire into."

Let this same student, in the course of his practice, be called upon to argue some great question of constitutional law, or let him become a legislator or a judge, it will not be pretended, that with a crude, shallow, superficial smattering of the history and establishment of the eternal principles which underlie all intelligent legislation, and all sound jurisprudence, he can fitly perform the important duties imposed upon him, no matter how honest he is, nor how much "good, hard common sense" he may have, nor what, in any sense, may be his natural abilities. Let him be confronted at the bar, or on the bench, or in the legislative halls, with a *thorough lawyer*, cultivated, well-read, more or less familiar with the history of the law from its earliest infancy, and with the lives and characters and doctrines and writings of its expounders and disciples in every age, and the result will be his utter discomfiture and defeat in any fair trial, while his more learned, and therefore more fortunate brother is winning his way to the highest measure of eminence and success.

It is not the purpose of this article to project any new system of education, or a more strict line of examination for students (much as this is needed), or new rules for governing admissions to the bar; but to direct the careful, thoughtful attention of the profession to the constantly increasing laxity in these essentials, and the growing spirit of disregard and indifference to these time-honored and once indispensable attainments.

The writer once heard an old lawyer of good education, solemnly declare that Blackstone himself ought to be abolished, and the publication and use of his works prohibited.

Our position is, not that proficiency in these studies ought to be imperatively prescribed as a condition precedent to the admission of students to the bar; but that the profession ought, in every possible way, and on every convenient occasion, both by precept and example, to inculcate, further and encourage the taste for and pursuit of them, as a necessary adjunct to the regular course of study prescribed for students, and as a most beneficial and powerful aid to the practitioner in almost every department of his labor, as well as in the true enjoyment and faithful performance of the duties of any political or judicial position he may be called upon to fill. The books are plentiful and easy of access, and nothing is needed but the judicious cultivation of a taste for their constant study and use.

A solid foundation for furture success, as well as a most refreshing relaxation from the ordinary cares of business, can always be found in the perusal and study of the ancient writers on legal subjects, the various and interesting collections of legal history, and the lives, writings and speeches of the high priests of the profession in every age, all of which may be classed as "The Literature of the Law." C.

The Guarantee of Order and Republican Government in the States.

No student of constitutional law should fail to read the paper which Mr. Justice Cooley has contributed, under the above caption, to the January number of the International Review. It is a manly and vigorous protest, from a non-partisan stand-point, against further interference by the federal government in the domestic affairs of the states, under the pretext of guaranteeing to them a republican form of government and of protecting them against domestic violence. When we read such dignified yet emphatic utterances of a great constitutional jurist against usurpations founded on

shallow pretexts and sustained by military violence, the wish involuntarily arises that the soldier whom we have selected as the national executive, could have had the wisdom to surround himself with such advisers. If such a man could be persuaded to devote his wisdom and ripe juridical learning to political affairs, he would win and deserve the encomium of Milton on the younger Vane:

> Than whom a better senator ne'er held
> The helm of Rome, when *gowns*, not *arms* repelled
> The fierce Epirot and the African bold.

Under the constitution of the United States (Art. 4, § 4), the general government obligates itself to each of the states: 1. To guarantee to it a republican form of government; 2. To protect it against invasion, and, on the application of the legislature, or of the executive when the legislature cannot be convened, against domestic violence. Mr. Justice Cooley remarks upon the meager observations with which the writers in the Federalist dismiss the first of these guarantees, the vagueness of the term "republican in form," and the importance, beyond the expectations of the framers of the constitution, which this provision has assumed. He entertains the opinion that the sole object of this provision was to prevent the introduction into the family of states of governments monarchical in form, or having a hereditary executive. "No doubt can exist," says he, "that the people of the United States, to whom the name of king was then specially obnoxious, adopted the constitution with the understanding that no government with a hereditary executive could be received or could remain within the family of states. The king, to their apprehension, was the representative of the oppressor whose yoke they had rejected, and by a republic, they understood a government in which a king would have no part, and whose chief ruler would be chosen directly or indirectly by the people by virtue of their inherent right to govern themselves. And the phrase they employed—a republican *form* of government—has peculiar significance, and may well incline us to believe that the form was had in view quite as much as the substance. The guarantee was clearly intended, as Mr. Madison understood it, to be of the governments then existing, and of such similar ones as might by Congress be received into the Union subsequently, modified as they might be, from time to time, by the people of the states respectively." But he is of opinion that by the term *the people*, is to be understood that portion of the inhabitants of the state (limited in every government) to whom the constitution has confided the right of suffrage. "The federal constitution," says he, "contemplates no revolution in state governments. It may be assumed to have contemplated changes in constitutions and laws, in accordance with constitutional forms, but it supposed these would prove ample to meet the reasonable demands of reform, and it endeavored to make most effectual provision against changes which might be attempted outside of those forms, and by the employment of force."

He next considers separately the four instances in which federal interposition in the domestic affairs of the states was either justified, or sought to be justified, by the constitutional gurrantees under consideration: 1. The Dorr rebellion; 2. The reconstruction of the insurgent states; 3. The Louisiana case; 4. The Arkansas case.

In the case of the Dorr rebellion he explicitly justifies, upon the grounds last quoted, the action of President Tyler in supporting the Charter government against insurrectionary overthrow. Since the revolution the people of Rhode Island had continued to administer their government under a charter granted by Charles the Second. This was their only constitution. It operated to disfranchise one-half the people; and the Dorr rebellion was a popular movement, not sanctioned by the legislature, but supported, perhaps, by a numerical majority of the people, in favor of a new constitution and a broader basis of suffrage. Hard and unjust as the case may seem, the legal duty of President Tyler to support the existing *status* against insurrectionary overthrow, was clear; and his action in the premises was acquiesced in by the country, and has never been criticised, so far as we know, by any eminent jurist. The Rhode Island case points to the fact that instances may arise, even in a republic like ours, where a large number, perhaps a numerical majority, of the adult male population may be disfranchised, and can only regain their lost privileges, or acquire them if they have never had them, by revolutionary means. To say that in such a case the general government should become the constant and permanent agent of repression, would seem to contradict the principles embodied in our declaration of independence, which Americans regard as fundamental political truths, and to involve an entire repudiation of the reasons which justified our revolution. It nevertheless remains true, as stated by Mr. O'Conor in discussing the Louisiana question, that "with revolutions juridical science has little or no concern."

The precedent of the Rhode Island case is of a two-fold nature; for, in addition to the President, the judiciary was invoked, and it enabled the Supreme Court of the United States to declare, as it did in Luther v. Borden, 7 How. 1, that the courts cannot interfere in the determination of *political questions;* and this declaration of law that court has since repeatedly followed.

Mr. Justice Cooley concludes that "the case of Rhode Island ought to be regarded as settling, for all time, the points involved in it: 1. That the President and Congress must continue to recognize and support the constitution once established in a state, and regularly accepted as republican, against any revolutionary measures that may be instituted for its overthrow; and, 2. That their action in the premises is not subject to judicial review."

The reconstruction measures Mr. Justice Cooley regards as altogether exceptional, not to be defended on strict constitutional grounds, and he protests against any tendency to ripen them into precedents. No doubt a majority of the able lawyers who supported them in Congress would concur in an attempt to justify them upon grounds of public necessity growing out of an anomalous and unforseen condition of affairs, rather than upon any authority directly deducible from the constitution. The language in which M. Justice Cooley insists that a repetition of these extraordinary measures shall cease, deserves to be written in letters of gold. It would be well if a just solicitude could be awakened in the breast of every citizen in favor of getting back at once to the plain landmarks of the constitution, and to the strict canons of constitutional interpretation. He says:

> The cases which have occurred since reconstruction was treated by the federal government as complete, though in every instance having more or less connection with the reconstruction measures, and springing more or less di-

rectly from conditions which were the legitimate consequences of the war, must nevertheless be brought to the test of strict law. When once the war was entirely at an end, the excuse of its overruling necessity was no longer admissible, and the need of securities for peace, could no longer be urged, after all which had been demanded had been given and accepted as sufficient. If since that time the domain of state government has been invaded by federal authority without the warrant of the constitution, no hesitation should be exhibited in any quarter in visiting the act with such unequivocal condemnation as shall afford no encouragement to the like ventures in the future. It is not a light thing for that supreme central authority which was created by the states with certain limited and defined powers, in order to promote union and insure domestic tranquility, to turn upon the states with the power thus conferred, and employ it for their humiliation and degredation, with the inevitable result of weakening the Union and promoting discord. The boundaries of authority were fixed by solemn covenant, and deliberately to break this in the smallest particular, would be deliberately to break the bonds of union, to sow the seeds of distrust, and to furnish the excuse for future violations, which in the end would make the covenant itself not a friendly partition of powers, but a hostile frontier across which contending parties would charge and be driven according as one or the other should prove strong enough to take the aggressive.

Mr. Justice Cooley treats the Louisiana case with severe, yet dignified brevity. He characterizes the order of Judge Durell, as the general voice of enlightened Americans has characterized it, as "a case of undeniable usurpation;" and he indulges in the reasonable assumption that that which is condemned by the general voice of the country, and which stands reproved in all official reports, will never be relied upon as a precedent. We should have been glad if he had said something upon the question discussed by Mr. Charles O'Conor, Mr. Reverdy Johnson, Mr. Jeremiah Black and Mr. George Ticknor Curtis, in the New York Herald, whether the President, having committed an error in enforcing the extra-judicial and void order of Judge Durell, may lawfully undo that error. The "midnight order" of Judge Durell, being an "undeniable usurpation," what should be said of the attitude of the President, who, now that he is doubtless convinced of his error, persists in supporting in power the man thus elected governor of a state by an injunction issued by an inferior federal judge?

He next considers the Arkansas case, and concludes that the legislature had exclusive jurisdiction to determine the contest for the office of governor; that having determined it in favor of Baxter, and he having entered upon the discharge of the duties of the office, he became governor *de facto* and *de jure*, and that it was the clear duty of the President to support his government against violent overthrow, when called upon so to do in the manner pointed out by the constitution. We are glad to find that Mr. Justice Cooley gives prominence to the very important principle, that in cases of this kind the President cannot exercise the purely judicial function of investigating the *merits of the case*, but that he is bound by the decision of the duly constituted state tribunal having jurisdiction to determine the result. We expressed the same view when discussing the Louisiana question. 1 CENTRAL LAW JOURNAL, 475. Mr. Justice Cooley says: "The tribunal which the state constitution had given complete authority in the premises, had decided the election, and the President could not go behind the record, and was not at liberty to question the conclusion." And to make this declaration more impressive, he says, in another place: "The case of Arkansas should settle * * by the acceptance of the President's conclusion, the doctrine that as between two persons claiming the state executive authority, if the competent state tribunal has rendered decisions, such decisions must be accepted and followed. Any other doctrine must strike at the foundation of state government, and leave Congress and the President supreme." But this question is capable of examination in a still closer aspect. Mr. Justice Cooley says: "There might be such a forcible and fraudulent usurpation of *all the departments* of a state government as would render a competent decision of questions of contested election impossible. Obviously, the decision of a usurping legislature that a usurper was chosen governor, could bind no one." He argues that such a juncture of affairs is extremely improbable (a conclusion we are not quite willing, in view of the experience of the past few years, to admit); yet he concedes that such a case of usurpation might arise as would render the intervention of the federal government imperative, but he justly urges that "a very clear *prima facie* case should be presented to Congress before its intervention should be secured."

So strong is his feeling that it is time for the general government to withold its hands from the internal affairs of the states, that he even deprecates the congressional investigation which has recently taken place in the Arkansas case. "A congressional investigation," says he, * * "can never be harmless when it is ordered on grounds or under circumstances which have an inevitable tendency to strengthen, encourage and perpetuate the unconstitutional notion that Congress may rightfully intermeddle with and overhaul state affairs and state goverments whenever anything in their administration shall be displeasing to the majority in that body. * * Anything may be suggested as possible when the whole subject is thrown open to a congressional discretion, proverbially prone to be carried away by the passions and excitements of the hour."

Power of Judiciary of a State to Control the Acts of Officers of the Executive Department of the State Government.

JACOB KEUCHLER v. GEORGE W. WRIGHT.

Supreme Court of Texas, August, 1874.

Separate opinion of Mr. Justice ROBERTS.

ROBERTS, CH. J.—This was a suit for mandamus instituted in 1871 by George W. Wright, to compel the commissioner of the general land office of the state of Texas, to issue to him a patent to land which he had located and surveyed by virtue of a land-certificate for the unlocated balance issued to Henry Buckler, for 640 acres of land assigned in writing to said Wright by Eliza Higgins, widow of Henry Buckler, and her present husband, Wm. L. Higgins, and Isabella Buckler, claiming to be the widow and heir of Henry Buckler, to which written transfer of said certificate is attached the private acknowledgement of the said married woman, taken before a justice of the peace in the state ot Arkansas. This land certificate was located and surveyed on lands known as the "state sections," within the Memphis, El Paso and Pacific Railroad reservation.

The Commissioner appeared by the Attorney-General, and demurred to the petition of Wright, and justified his refusal to issue the patent on the ground that the lands located and surveyed by Wright, were, by the constitution and laws of the state in force, reserved from location by virtue of such certificate. The only evidence before the Court was a certified copy of the papers on file in the general land office.

The Court below determined (the case being submitted to the court on the pleadings and on said certified copy of the papers in the land office) in favor of the plaintiffs, and awarded a peremptory *mandamus* against the commissioner, from which judgment an appeal was taken, and brought into this Court in 1872.

The supreme court, in 1872 delivered an opinion and rendered a judgment reversing the judgment below, and dismissing the suit. At the same term a rehearing was granted. In 1873 the supreme court delivered another opinion, sustaining the first, and confirming its own judgment already rendered in the case. At the same term, in 1873, another motion for rehearing was made by Wright, which was continued at the last term, and the judgment suspended to await the determination of the motion for rehearing. The case now stands before this court upon that motion for rehearing. It has been argued before the court to enable its present members to determine upon the propriety of granting the rehearing.

Having examined into the merits of the case and jurisdiction of the court, and finding no ground to believe that a rehearing would result in any substantial change in the judgment of the court already rendered by our predecessors on the bench at a former term, and in support of which they had delivered two opinions, I was inclined to join in simply refusing the motion without an opinion, thereby leaving the case to be a decision of our predecessors, made at a former term.

As, however, it has been deemed appropriate by some of my brethren, the court now being full, with all the regular members on the bench, to express an opinion upon the question of jurisdiction, on account of an opinion lately delivered, wherein there was a divided court and a special justice on the bench, (Bledsoe v. the International R. R. Co.), I deem it an opportune occasion to present my own views upon the question of jurisdiction in this case, having been in part expressed previously in the case of Randolph v. H. T. and B. Railway Co., 24 Tex. R. 317. It is proper, also, that I should say that the majority of the court, of which I was one, in the International railroad case, did not intend in making that decision to influence the decision of this or any other case against the commissioner of the G. L. O., by the reasons given or arguments used therein. Nor is anything designed to be said in this opinion by way of aiding or supporting what is decided in that case, being fully satisfied that the opinion in that case is amply able to "stand alone." In this opinion it is designed to present the provisions of the constitution, the statutes and previous decisions of this court, so as to furnish the materials within itself sufficient to enable a judgment to be formed of the true merits of the case.

This, and a want of time at the close of a long session, will neccessarily lengthen it beyond what might be desirable, and prevent it from having the system that might otherwise be given to it.

My opinion is, that the mandamus will not lie in this case, on the following grounds:

1. A mandamus cannot be legally issued to any one of the heads of the executive department in the state of Texas, to compel him to exercise any power in the performance of any official function confided to him as such executive officer, by the constitution and laws of this state.

2. That the issuing of the patent, under law and facts as presented in this case, is the exercise of a power in the performance of such an official function, so confided to him.

3. That the commissioner of the general land office, under and by virtue of the constitution of the state of Texas, adopted in 1869, and the laws of the state consistent therewith, is one of the heads of the executive department in the government of the state of Texas.

There might be other objections raised upon a rigid examination of it; such as, that it is an agreed case to get a legal opinion from the court; the proof of the facts pretermitted and not examined into by the court below; defect in the mode of proving the right of the plaintiff below to the certificate, and in his consequent right to sue; and defect in parties to the suit, it being ex-officio known to the court that Keuchler, former commissioner, is not not now in office.

These, however, are matters peculiar to this case, and will not be noticed otherwise than incidentally, if at all, not being necessary to accomplish the purpose of this opinion.

It may be well to give, by way of introduction, what is said of the writ of mandamus as a remedy in law books, and decisions that treat of the subject.

"A writ of mandamus is in general a command, issuing in the king's name from the Court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some *particular* thing therein specified, which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposed to be consonant to right and justice." 2 Cooley's Blackstone, 110. "To render the mandamus a proper remedy, the officer to whom it is directed must be one to whom, on legal principles, such writ may be directed, and the person applying for it must be without any other specific and legal remedy." "Questions, in their nature political, or which are, by the constitution and laws submitted to the executive, can never be made in this court." 1 Cranch, 279.

"It lies where there is a refusal to perform a ministerial act, involving no exercise of judgment or discretion. It lies also where the excise of judgment and discretion are involved, and the officer refuses to decide; provided, that if he decided, the aggrieved party could have his dicision reviewed by another tribunal."

"It is applicable only in these two classes of cases. It cannot be made to perform the functions of a writ of error." Com'r v. Whiteley, 4 Wall. 534. Nor can it be used so to act as an appeal from the determination of the officer in the exercise of executive functions. 17th Howard, 225; 7 Wall. 352.

As all the decisions assert that the act required to be done by one of the high executive officers must be a ministerial act, and that, where public duties are confided to him by law, "he is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him, as part of his official functions (9 Wall. 312), it may be well to furnish one of the numerous attempts that have been made to define or describe this distinction between ministerial and official acts, which it may become material to again quote and notice more particularly hereafter. "The distinction, between ministerial and judicial and other official acts, seems to be, that where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of judgment or discretion, the act is ministerial; but where the act to be done involves the exercise of discretion or judgment, in determining whether the duty exists, it is not to be deemed merely ministerial." 5 Tex. Rep. 479.

A reference to the two acts, and it is believed to be the only two acts which have been adjudged by the Supreme Court of the United States (during its existence of over eighty years) to have been such ministerial acts, will perhaps serve to aid somewhat in a proper understanding of such definitions.

"Where a commission to a public officer (a justice of the peace in D. C.) has been made out, signed and sealed, and is withheld from the person entitled to it (by the secretary of the United States), it is a plain case for a mandamus, either to deliver the commission, or a copy of it, from the record." Marbury v. Madison, 1 Cranch, 268. The facts in the second case were, that Stokes *et al* were mail contractors, and had their credits allowed and accounts adjusted in the postmaster-general's office, while W. T. Barry was in that office; his successor, Amos Kendall, struck out and disallowed part of the allowances and credit. Congress passed a law directly requiring the postmaster-general to credit Stokes *et al*

with whatever sum of money the solicitor of the treasury (to whom the same law referred the matter, to be settled and the result reported to postmaster-general), should decide should be due to them. The report of the solicitor being made, the postmaster-general still withheld the credit. (By the law of the United States then in force, the account, as made out in the department, would have been *prima facie* evidence as to the state of the account, in a suit against Stokes *et al.* Brightley's Digest.) Suit of mandamus being brought against Kendall, the supreme court say: "He was simply required to give the credit. This was not an official act any other sense than being a transaction in the department where the books and accounts were kept, and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of court, is an official act." Justice Catron, in the case of Decatur v. Paulding (14 Pet., 521), gives the following quotation and explanation of the decision: "He was (say the court) simply required to give the credit, and this was no more an official act than the making of an entry by a clerk, by order of a court of justice; it was, in every just sense, a mere ministerial act." He adds: "*Had it not been placed on this narrow ground, the decision could not have been made.*" Diligent search has been made through the decisions of the Supreme Court of the United States, and this is the first and last and the only case that has been found in which a mandamus has been sustained in that court against any one of the heads of the executive department of the government.

The first one, Marbury v. Madison, though it seems to have originated the doctrine in this country, by an opinion of transcendant ability, studied and artistic as an argument, was on a point not necessary to be decided in the case, for want of jurisdiction in the court, it being an original suit filed in the Supreme Court of the United States, which that court, being an appellate court (with a few express exceptions), had no jurisdiction to try and determine. All the fact necessary to determine their right to act was the original petition or application for the writ alone. All of the opinion, based upon facts outside of and beyond that, was a mere *dictum* of the court, and upon that *dictum* the subsequent decisions were based, so far as it was followed at all. The questions arising upon the right of a court to award a mandamus to any of the high executive officers of the state, bring into consideration the structure and operations of the government far more extensively than usually attend legal investigations, and necessarily invite to us a much broader view of the subject. Those who advocate a liberal exercise of this power by the court, usually base it upon certain general propositions, announced as axiomatic truths in a government of constitution and laws, such as the following: "No man, or body of men, officer or citizen, is above the law, and all are bound to obey the law" "For every legal right, when withheld, there must be a legal remedy."

"It is the peculiar province of the courts to construe, declare and enforce the law in vindication of the legal rights of the citizen."

Without entering into a minute discussion of how far the propositions are theoretical, and with what qualifications they must be subject in the practical operations of any government, it will suffice to embrace them all in one general exposition, which is, that in every organized government there must of necessity be a finality in the determination of the rights of individuals, in whatever departments they may arise or pertain to, and some men, or set of men, must make the final determination. In a despotism, such one man is easily pointed out. In a republican state, such as ours, wherein all of the powers or government are divided into three distinct departments, there must be a final determination of each department for itself of all such matters as are assigned to it in the division. Otherwise there is no division—no binding, effective and "distinct" division of powers. The framers of our constitution were determined to have no equivocation or doubt on that subject, if it were possible to prevent it by plain words.

ARTICLE II.

"Division of the Powers of Government."

"Section 1. The powers of the government of the state of Texas shall be divided into three distinct departments, and each of them to be confined to a separate body of magistracy, to-wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another; and no person or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

The departments of government shall be distinct; that is, so separated as not to be confounded with each other. To make this doubly sure, it is also added in effect, that they shall be kept separate in person, and in action. A judge, for instance, shall not be an attorney-general; nor shall he exercise any power properly attached to the office of attorney-general; such for instance, as giving advice to the commissioner of the general land office about how to discharge his official duties, nor can he be called on or required so to do, even though the legislature should pass a law requiring him to do it. That is simply because the constitution, in plain terms, forbids it.

The division made by the constitution, in and of itself, produces co-ordinancy in the three departments, and the separate independence of each one, from any conjunction with or control by the others in their allotted sphere of action. If this be not so, then there is no division. If one department may exercise its duties according to its own judgment, except when another department chooses to control it and make it perform its duties in another and different way from that dictated by its own judgment, then in that event, there has been no division of the powers of government into three distinct departments, and section 1 in article 2 of the constitution, means nothing. The duties of each of these departments, in relation to the rights of individuals, involve matters of law and of fact to be determined on, and when a final determination has been reached in any department to which the subject-matter properly belongs, there is no power in another department to order that final determination to be changed or reversed by the department first making it. If the governor will not sign a patent, or a commission, who can order him to do it, and make him obey? If the supreme court will not decide a case, when they can and ought to do it, under the law, who can order them to do it? If the legislature will not vote an officer his salary, to which he is entitled under the organic law, who can order the legislature to do their duty, and make them do it?

Each department may have its own reasons for not acting, or, if possible, none at all. The land locator, who failed to get his patent, the litigant demanding a decision in the supreme court, and the officer who had asked for his well-earned salary, have each found whether or not every man or set of men are bound to obey the law, whether or not there is a legal remedy for every legal right withheld, and whether or not it is the peculiar province of the courts to construe, declare and enforce the law in vindication of the rights of an injured citizen. But suppose they act according to their judgment, instead of refusing to act, and act contrary to the interest and supposed legal right of the several applicants, what remedy have they to coerce different action? That the independent, separate action and co-ordinancy of the three distinct departments in dealing with the rights of the individual, involving facts and the law relating thereto, may be further illustrated, let it be supposed that a locator applies to the land office for a patent, and presents to the commissioner a certificate, a transfer to himself and a survey. These are all facts involving law questions in determining their sufficiency. The commissioner examines his maps in connection with the survey, to fix the locality of the land and other titles in his office, if necessary, to ascertain whether the land is vacant or not; he finds the land has been previously appropriated by a Spanish or Mexican grant; he examines into the

facts relating to that title. He turns then to the various laws affecting the validity of the old grant. And upon full consideration of the facts and law, he determines that the owner of the old grant has a vested right of property in the land, and he, having determined that for himself, refuses the patent to the locator. Now, if the commissioner is an executive officer, not subject in that particular determination to the control of any other department, it is a finality as to the issue then presented. The locator may stand upon his certificate thus located, and contest the validity of the old grant in a suit in court, and the court may determine that he has the better title, and if so determined by the court of last resort, that will be a finality as to the issue presented; and no other department can cause it to change that final determination. If the locator, instead of applying to the land office, had applied to the legislature, submitted his facts to their consideration, and had procured a declaration of annulment of the old grant, and a legislative grant of the land, by metes and bounds, to himself, the owner of the old grant might institute a suit in court, and have his adjudged to the better title to the land. Thus each department may act as a check upon the others, by each acting independently in its own sphere — the check being rather negative in relation to the other departments than positive and affirmative control over them. It is thus the three, acting in separate independence, and at the same time in harmonious co-ordinancy and co-operation, that good government may be accomplished. It is deemed sufficient to quote one remark of the court in the case, Kendall v. United States, in which it is said: "The theory of the constitution undoubtedly is that the great powers of government are divided into separate departments, and so far as these powers are derived from the constitution the departments may be regarded as independent of each other. 12 Peters, 609.

The remaining question to be presented in this connection is, does the commissioner of the general land office belong to the separate body of magistracy to whom are confided the executive powers of the government of the state of Texas? The most perspicuous answer to this question is made by a quotation from the constitution and laws, with a brief reference to his official duties thereunder.

"ARTICLE IV.

"*Executive Department.*

"Section 1. The executive department of the state shall consist of a chief magistrate, who shall be styled the governor, a lieutenant governor, secretary of state, comptroller of public accounts, commissioner of the general land office, attorney-general, and superintendent of public instruction."

Section 22 after prescribing the manner of the election of the commissioner, his term of office and qualifications to be the same as those of the governor, says further: "He shall be the custodian of the archives of the land titles of the state, the register of all land titles hereafter granted, and shall perform such other duties as may be required by law."

Other sections of the same article prescribe the duties of the other heads of the executive department. Article X establishes the general land office at the seat of government, and authorizes the legislature to establish such subordinate offices as they may deem expedient.

Various laws have been passed, and are now in force, authorizing the commissioner to appoint a corps of draftsmen, translators and clerks, for the dispatch of the business of his office, and prescribing various duties relating to the perfecting and securing of land titles. It is provided also that he shall have a seal, and that "all patents for lands emanating from the government, shall be in the name and by the authority of the state, and under the seals of the state and the general land office, and shall be signed by the governor, and countersigned by the commissioner of the general land office." 1 Pas. Dig. Title Land, and see Arts. 4280–1.

Thus is his position as one of the heads of the executive department, secured by a higher sanction than that of the commissioner of the general land office of the United States. It is higher because it is ordained by the constitution, and not by a law that the legislature can change or repeal; and because he has a greater independence in the tenure of his office, and thereby is more independent of the control of the chief magistrate. He is elected by the qualified voters of the state, as the governor is. The fact that he is vested directly, and not mediately through the governor, with a definite portion of the powers of the executive department, can hardly be held to render him any more liable to the control of the judicial department, than if he were created by law the minister, or official servant of the governor, subject to his direction and control in the performance of the executive acts confided to him by the constitution and laws. This constitutional independence in him as a member of the executive department, constitutes a limitation upon the powers of the legislature in prescribing "such other duties" as he may be required to perform. They must be executive, pertaining to his distinct portion of that department. His determinations, though they may, and usually do, require a consideration of both law and facts, have neither the conclusiveness of judgments nor the force of laws. Nor can the legislature impose on him duties extraneous and not pertaining properly to the business of his office. For if they could, they would thereby efface and destroy the specific designation, and break down the barriers of the division of the powers of the government made by the constitution, which it is not within the power of any law to do, whatever may be or may have been its source. Marbury v. Madison, 1 Cranch; Cooley's Con. Lim. and cases cited, p. 115, 116. For the same reason a judge, as belonging to a different body of magistracy, cannot by law be required to exercise any power properly attached to the commissioner in the official discharge of his executive duties, unless it can be found to be an excepted "instance," which has been "expressly permitted" in the constitution itself. See end of Art. 11, Section 1, Constitution, 1869.

This leads us to look to the judicial department to see if an instance of exception to the distinct division of the powers of government can be found there expressly permitted.

"ARTICLE V.

"*Judicial Department.*

"The judicial power of this state shall be vested in one supreme court, in district courts, and in such inferior courts and magistrates as may be created by this constitution or by the legislature under its authority."

"Section 3. The supreme court shall have appellate jurisdiction only, which, in civil causes, shall be co-extensive with the state" (and by the late amendments "in criminal causes," also.)

"The supreme court, and the judges thereof, shall have power to issue the writ of *habeas corpus*; and, under such regulations as may be prescribed by law, may issue the writ of mandamus, and such other writs as may be necessary to enforce its own jurisdiction."

"Sec. 7. The district court shall have original jurisdiction of all criminal cases, and of all suits, complaints and pleas, whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to one hundred dollars, exclusive of interest; and the said courts, and the judges thereof, shall have power to issue the writ of *habeas corpus*, and all other writs necessary to enforce their own jurisdiction, and to give them a general superintendence and control over inferior tribunals."

It is to be noticed that in the above section, conferring jurisdiction upon the supreme court, there is given the power to issue the writ of mandamus, which is not expressed in the section defining the jurisdiction of the district court. The use and purpose for which the writ of mandamus was permitted to be issued by the supreme court and judges thereof, as well as the connection in which it is found, with "such other writs as may be necessary to enforce its own jurisdiction," rebuts the conclusion that it was de-

signed, by the fact of naming that writ, to confer on that court and the judges thereof any transcendent power of government over and above that which had been conferred upon them as a portion of the judicial department, Had it been so intended, the exception in their favor of the exercise of a power not judicial in its character should have been indicated as "expressly permitted," as it was provided it should be in the second article of the constitution, and should not have been left to be deduced by implication and inference from the use of the word mandamus, so connected in the sentence in which it is used as to militate against any such intention. Much less could any such intention be presumed in reference to the powers conferred on the district court by the constitution in defining its jurisdiction. McIntire v. Wood, 7 Cranch, 504; Graham v. Norton, 15 Wall. 427. In other words, we find nothing here that constitutes an exception in favor of the judicial department, in the general division and distribution of the powers of the government. No other part of the constitution expressly permits any portion of the judicial department to exercise the powers confided to the heads of the executive department, or to cause them to perform their executive powers, or to receive, entertain and decide an appeal from their determinations, made in the official performance of their executive duties. It follows from these principles that the executive has no power to order the courts to render their judgments in a particular way, nor have the courts any power to order the executive to perform his official functions, done in the discharge of his executive powers and duties, in any particular way, contrary to his own determination on the law and facts involved therein. For if they can, they are in effect exercising the powers confided by the constitution to the executive, on the principle of the rule of universal application, which cannot be evaded by indirection, that what one does by or through another, he does himself; and even stronger still, what one forces another to do against his will, he does himself, and is generally alone responsible for it.

The views here announced may not in the main be contested, as to the executive duties to be performed by the chief magistrate, the governor of the state. But it is denied that they apply in the same degree to the several heads of the executive department, and particularly to the commissioner of the general land office.

This is contended for on the grounds that the enumeration of the commissioner, as one of the officers of the executive department, is merely formal, that he performs the same duties, and is subject to the same control of the courts by the writ of mandamus, as he was formerly when his office was created, and his duties prescribed by the acts of the legislature and by the laws generally; and that the district court, at the seat of government, under the constitution and laws of the state, including the English common law, adopted in 184c, and now in force, except so far as it is inconsistent with our constitution and statutes, is authorized to issue to him a mandamus, requiring him to issue a patent, upon his refusal, when it shall be established *in court* upon a trial of the cause, that according to the facts and law applicable thereto, he ought to issue it.

This induces a retrospect into the state of the law and decisions in this state upon the subject of mandamus.

The constitution of 1845, as well as those subsequently adopted, contains substantially the same provisions in reference to the jurisdiction of the courts, as that of 1869 previously quoted. They contained the same division of the powers of the government into three distinct departments; vested in the governor alone the executive powers of the government, and provided for a general land office, but the commissioner was not mentioned, nor were his office or duties prescribed. By the act of the legislature, the jurisdiction of the district court was defined, by reiterating in substance the powers conferred in the constitution, to which was added, "and generally to do and perform all other acts pertaining to courts of general jurisdiction."

It was also provided in the same act, that "the judges of the district courts, and each of them, either in vacation or in term time, shall have authority to grant, on petition to them therefor, writs of *habeas corpus*, mandamus, injunction, sequestration, error, and *supersedeas*, and all other remedial writs known to the law, returnable according to law; provided that no mandamus shall be granted on *ex parte* hearing, and any peremptory mandamus, granted without notice, shall be deemed void; and further provided, that all writs of mandamus sued out against the heads of any of the departments or bureaus of government, shall be returnable before the district court of the county in which the seat of government may be." 1 Pas. Dig. Arts. 1405 and 1407. These are the only laws and statutes in force in the state of Texas relating to the writ of mandamus, and which alone have been in force since they were enacted in 1846, except the common law as applicable thereto. The adoption of the common law of England, in 1840, and its continuance in operation to the present time, does not bring with it, and make of force, in this state, the English statutes, extending from 9 Anne to 6 and 7 Victoria, as late as 1843; nor the rules of practice under them in the English courts, by which the proceedings under the writ of mandamus have, to a larger extent, been assimilated to, though not made regularly in all respects, a personal action. Tapping on Mandamus, mar. p. 439 to 454. See, also, Ibid. 282, mar. p., and following, as to proceedings under, etc. Under this state of the law the question was presented to the supreme court, in 1849, of the right of the court to award the writ of mandamus against the commissioner in a case involving the full exercise of his official judgment upon the facts and law, relating to the issuing of a patent upon certificates located and surveyed upon the land. The court decided in favor of the right of the court to entertain jurisdiction of the case, as a proper one for the writ, but decided against the issuance of a peremptory mandamus upon the merits of the case. Commissioner v. Smith, 5 Tex. R. 471. The court in that case say: The first question here presented can scarcely be considered now an open question. The practice of resorting to this proceeding against this officer, and to enforce the performance of this particular duty, is believed to have had its origin almost as early as the creation of the office itself, and to have been continued without a question as to its legality down to the present time. 2 Tex. R. 581. But the right to this remedy in a case like the present, rests upon other authority than the practice of courts. By a statute of the Congress of the Republic, approved January 25, 1841 (5 Statute, 84, Sec. 9), it is enacted that, "All writs of mandamus, sued out against the heads of any of the departments or bureaus of the government, shall be made returnable before the district court at the seat of government." It is well known that the statute was adopted in consequence of a practice then prevailing of calling upon the commissioner of the general land office, by process from the courts of remote counties, to show cause against the issuing of this writ in cases like the present, in such distant counties. This act certainly recognizes the right to obtain the writ at the seat of government. It must, moreover be regarded as a legislative recognition of the legality of the practice, then existing, of employing this writ as a private remedy, for it was its use as such which the legislature undertook to regulate. The use of the writ as a private remedy, seems to be conformable to modern practice. A part of the same section in the act of 1841, provided that "the several judges of this republic, in issuing writs of mandamus, are hereby directed to observe the rules which govern writs of mandamus at common law, as modified by the statutes of this republic." And by this same section it was declared that the rules of practice adopted by the supreme court in 1840, authorizing a peremptory mandamus before notice, was contrary to law. See Acts 5th Congress, p. 84, and for rules, see 1 Tex. R, 852. There was then no additional statute relating to mandamus, except that defining the jurisdiction the district court, by which the judges were given the right "to grant the writs

of *habeas corpus*, mandamus, injunctions, *supersedeas*, and all other remedial writs known to the law." Laws 1 Congress, p. 200, Sec 4, approved Dec. 22, 1836.

The two cases decided by this court, in which the peremptory writ was granted against the commissioner, previous to the opinion in 1849, above quoted, were Horton v. Brown, 2 Tex. R. 78, and Ward, Com'r v. Townsend, 2 Tex. R. 581, decided in 1847, the first of which was a suit between two litigants in relation to the right to land, commenced in 1839, in the county of Bastrop, and the writ to the commissioner was incidental to the suit, and awarded upon a reversal and reform of the judgment below. The decision was made by two judges alone, and one of them a special judge. In the second there was no statement of facts, and the rule was therein adopted that in the absence of a statement of facts, "the legal intendment is in favor of the judgment," In neither of these two cases was the right of the writ argued by the attorneys or discussed by the court. The two cases in Dallam's Digest have no reference to the commissioner of the general land offie.

Having brought to view the previous laws and decisions of this state that were referred to, and were in contemplation of the court in making the decision in the case of Com'r Gen'l L. O. v. Smith, in 1849 (5 Tex. R. 471), it may be well to make another reference to the opinion, so that the legal principles then laid down, and afterwards followed in one and announced in several as to the commissioner, may be fully and certainly understood. After announcing the rule, extracted from the decisions of the Supreme Court of the United States, that a mandamus will issue to an officer of the government, only when the duty to be performed is ministerial in its character, and not when the performance of the duty requires judgment and discretion, the learned justice conveys his own view of "the distinction between ministerial and judicial and other official acts." As authority for which, he cites: 12 Pet. R. 524–609; 14 Id. 497; 7 Cranch R. 504; 6 Wheat. 598; 6 How. R. 92, 100, 101, 102; B. L. Com. v. Bell, Dallam, 366; Monthly Law R. N. S. Vol. 1, No. 9, p. 399.

To illustrate his view of the distinction still more clearly, he proceeds to say, in the same connection: "There are various duties assigned by law to the commissioner of the general land office, to be performed before the patent can issue. He must pass upon the validity of the certificate and the survey; he must determine whether both are of such a character as, under the law, to entitle the party to a patent; he must also determine whether the land sought to be conveyed was vacant when located, or was appropriated by any previous claim which he is required by law to respect. When these and other such questions as may address themselves to the commissioner, under the laws prescribing his official duties, shall have been resolved in favor of the applicant, his right to his patent is clear and indisputable. The issuing of the patent, then, becomes a mere ministerial act, involving no exercise of judgment, and on which the commissioner has no discretion to refuse. To withhold it, would be the violation of a vested right." Further on he says: "We conclude that a *mandamus* may issue to compel the commissioner of the general land office to issue a patent, when it shall have been made to appear *to the court* that the right of the party is clear, and that it has been refused by the commissioner." 5 Texas R. 479 and 480. Here is presented a supposed case of the most common occurrence, and of the highest order of the exercise of official duties, involving questions of law and fact at every step of the investigation, for the determination of which it is often required that all of his powers of judgment and discretion must be put forth to perform his duty. It is just such a case as the one we now have before us, of Keuchler v. Wright. In all the other cases against the commissioner the same doctrine is practically held, notwithstanding but one other case has been found, since that opinion was delivered, wherein the peremptory writ was adjudged to be ordered, H. & G. N. R. R. Co. v. Keuchler. In that case both law and fact were required to be judged of, in the discharge of his official duty, and it could not have been decided with any reference to whether or not the act required to be performed was a ministerial act, in contradistinction to one requiring the exercise of judgment, as that distinction is drawn in the decisions of the Supreme Court of the United States, but simply followed in the track of the former decisions made in this court before the adoption of the constitution of 1869, which made the commissioner one of the constitutional heads of the executive department. There has never been a judgment rendered by the Supreme Court of Texas awarding a writ of mandamus against the governor, the attorney-general, the secretary of state, comptroller of public accounts, treasurer, or against the auditorial board, and only three against the commissioner of the general land office.

In view of all the matters here presented, what is the legitimate conclusion to be drawn from the opinion of Justice Wheeler, in Commissioner G. L. O. v. Smith (5 Tex. R), which has been frequently announced, and followed in one case against the commissioner since it was delivered? The answer seems inevitable that he was regarded by the court as a mere ministerial officer, whose office was created, and whose duties were prescribed by the acts of the legislature, whose office was a sort of bureau or mere commission of inferior grade, whose acts were neither directed by, nor could take shelter under, the executive department. The distinguished counsel, Volney E. Howard, who argued against the mandamus, seems to have taken it for granted, in his brief, that the commissioner was then a ministerial officer. 5 Tex. R. 477. Indeed, if the case supposed by Justice Wheeler in his opinion, involving, as it does, the whole range of facts and law, as does now the case before us of Keuchler v. Wright, is a case wherein he is required to perform a ministerial act only, then it must of necessity follow that he then performed no other than ministerial acts. For he performs none other more complex, more difficult, or of a character to require more official information and the exercise of more discretional judgment, than in the supposed case. The statutes of 1841 and 1846, recognizing the right of the district court at the seat of government to issue the writ of mandamus against the heads of departments and bureaus, can surely not be construed to authorize the use of the writ to review and revise, as if upon appeal, all the proceedings of the heads of the executive department, or to confer the power as to them, further than to ministerial acts. It is of the first importance that this matter should be thoroughly understood, as a starting point to the further consideration of whether or not a mandamus can be sustained against the commissioner, under the facts of this case, now that he has been made a constituent portion (by designation) of the executive department in the government of the state of Texas; and it is for that reason that pains has been taken in this opinion to bring out and present to view everything by which an intelligent conclusion could be arrived at from the matters so presented.

We are admonished that it is of very great importance in another point of view, when we turn to the late decision of the Supreme Court of the United States, in the case of Davis v. Gray, wherein the court sustain an injunction against the governor and commissioner of the general land office, restraining them from issuing patents to certain lands claimed as reserved to the Memphis, El Paso and Pacific Railroad Company, in which it is said, in reference to suits wherein the state is interested through its officers, as in this case now before us: "According to the jurisprudence of Texas, suits like this character can be maintained against the public officers who appropriately represent her touching the interests involved in the controversy. In the application of this principle there is no difference between the governor of the state and the officers of a state of lower grades. In this respect they are upon a footing of equality. A party, by going into a national court, does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same local-

ity. The wise policy of the constitution gives him a choice of tribunals. In the former he may hope to escape the local influences, which sometimes disturb the even flow of justice. And in the regular course of procedure, if the matter be large enough, he may have access to this tribunal as the final arbiter of his rights. Upon the grounds of the jurisprudence of both the United States and of Texas, we hold this bill well brought as regards the defendants." That is, the Governor and Commissioner of the General Land Office of Texas. 16th Wall., p. 221, 222. That suit was brought in the Circuit Court of the United States for the Western District of Texas, since the adoption of the constitution of 1869, and was decided in the Supreme Court of the United States, at the December term, 1872, upon the authority of the cases cited therein of Texas decisions, to-wit: Ward v. Townsend, 2 Tex. R 581; Cohen v. Smith, 2 Id. 51; Commissioner G. L. O. v. Smith, 5 Tex. R. 471; McLelland v. Shaw, 15 Tex. R. 319; Stewart v. Crosby, Id. 547; H. & G. N. R. R. Co. v. Keuchler, 36 Tex. R. 382 Every one of these Texas cases (except the last, which simply follows the others), is based upon the principle announced in the case of Commissioners v. Smith, as before shown, and, as it is believed, cannot be placed upon any other principle than that the commissioner was a ministerial officer, and was not then regarded or treated by the courts of Texas, in passing upon his acts, as one of the heads of the executive department of the state of Texas.

It might be appropriate, in reference to the case now before us, to see in what light the Commissioner of the General Land Office of the United States is regarded by the Supreme Court of the United States.

It was decided by the Supreme Court of the United States, that a writ of mandamus would not issue to the commissioner of the general land office in a case involving the exercise of judgment upon a complication of facts, or to use the language of the court, which "calls for the exercise of the judicial functions of the officer," and it is added, in reference to whether a writ would lie against him at all, "we have found no case in which this power has been exercised." 5 Wall. R. 565, U. S. v. Com'r. The case of Gains v. Thompson was an injunction against the secretary of the interior and commissioner of the general land office to restrain them from cancelling an entry under which lands were claimed. In denying the right to the injunction, which was regarded as being analagous in principle to mandamus, as was done in the case of Davis v. Gray, above quoted, the court say: "A ministerial duty, the performance of which may in proper cases be required of the head of a department by judicial process, is one in which nothing is left to discretion." "The action of the officers of the land department, with which we are asked to interfere in this case, is clearly not of this character. The validity of plaintiff's entry, which is involved in their discretion, is a question which requires the careful consideration and construction of more than one act of Congress." "It is far from being a ministerial act under any definition given by this court." 7 Wall. R. 353. The same opinion, quoting and applying to that case, with approbation, a part of the opinion of Ch. Jus. Taney in the case of Decatur v. Paulding (14 Peters, 497) says: "The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case, where the law authorized him to exercise judgment or discretion. Nor can it, by mandamus, act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care." The interference of the courts with the performance of the ordinary duties of the executive departments would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them. 7 Wall. p. 352. What is here said may be applied with equal or greater force to the case before us, that a careful consideration and construction of more than one law has to be made by the commissioner; that it requires judgment and discretion, both as to the law and to the facts; that a mandamus, sustained, would be the act of the court in guiding and directing his judgment or discretion, in the ordinary exercise of his official duties; and that it would be, in effect, entertaining and passing upon an appeal in a regular trial *de novo* from his determinations, as much so, indeed, as an ordinary appeal or *certiorari* from a justice's court to a district court. Decatur v. Paulding, 14 Peters, 515.

A mandamus cannot be made to perform the functions of a writ of error, nor be made to subserve the purpose of deciding a legal question merely as devised and obviously intended in this case. Com'r. of Patents v. Whiteley, 4 Wall. 534, 523. Tapping on Mandamus, p. 68.

"When the duty is not strictly ministerial, but involves discretion and judgment, like the general doings of a head of a department, as was the respondent here, and as was the case here, no mandamus lies." Reeside v. Walker, 11 Howard R. 290.

A third and still later case may be referred to, which, if possible, more strongly enforces the doctrine that the commissioner of the general land office cannot be required by mandamus to issue a patent to land. It is the case of the secretary (of the interior) v. McGarrahan (9 Wall, 312–314) in which it is held that: "Though mandamus may sometimes lie against an executive officer to compel him to perform a mere ministerial act required of him by law, yet such an officer, to whom public duties are confided by law, is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as part of his official functions." After referring to the case of Kendall v. The United States (12 Peters, 608), in which it had been decided that a writ of mandamus could be issued to enforce the performance of a purely ministerial act by one of the heads of the executive department, the opinion proceeds to say: "Subsequent decisions of this court have affirmed the same principle. But in all of the subsequent cases the principle is strictly limited to the enforcement of mere ministerial acts, not involving the necessity of taking proofs, and it has never been extended to cases where controverted matters were to be judicially heard and decided by the officer to whom the writ is required to be addressed. For authority for these priniciples there is cited Decatur v. Paulding, 14 Peters, 497; Brashear v. Mason, 6 Howard, 99; Gains v. Thompson, 7 Wall. 353; Reeside v. Walker, 11 Howard, 289; U. S. v. Seaman, 17 Howard, 230; U. S. v. Guthrie, 17 Howard, 304; Com'r of Patents v. Whitley, 4 Wall.; U. S. v. Com'r, 5 Wall. 563. To apply the principle established by such an unbroken line of authorities to the case then under consideration, the opinion proceeds: "Patents for land are required to be signed by the President in person, or in his name by a secretary under his direction, and they are to be countersigned by the recorder of the general land office." 4 Stat. at Large, 663, 5 Id. 417. See also the statute of Texas previously quoted, requiring patents to land to be signed by the governor, and countersigned by the commissioner of the general land office. "Such patents cannot be issued and delivered to any party without the signature of the President, and no proceeding to compel either the commissioner of the general land office, or the secretary of the interior to issue such patent, can be sustained while that provision of law remains unrepealed." The Secretary v. McGarrahan, 9 Wall. 314 (citing U. S. v. Land Com. 5 Wall. 563). No subsequent decision of the Supreme Court of the United States has changed or varied this ruling, and therefore it would be useless to attempt to add any other authority to the overwhelming weight already piled up, perhaps superfluously.

These decisions of the Supreme Court of the United States, positively deciding the right of the courts to coerce the issuing of a patent by mandamus to an executive officer, were made long after all of the decisions of the Supreme Court of Texas (except that of H. & G. N. R. R. Co. v. Keuchler, in 36 Texas R.) in relation to the rights of the courts to issue a mandamus against the commissioner of the general land office to issue a patent for lands, hav-

ing all been rendered since 1866. It might be well to notice that the very authorities cited in the Texas decisions to warrant the mandamus against our commissioner of general land office, are the same as those cited by the Supreme Court of the United States to warrant their refusal of it against their commissioner; and still our decisions are cited by that court to warrant the writ, even against the governor, when such a ruling had never been made by our court as to the governor, or the heads of departments, but only against the commissioner treated as a ministerial officer.

Now, in view of these decisions, can it be said with any propriety, that, in law, or by any mode of constitutional construction of he powers of government, the commissioner of the general land office of the United States, whose office is created, and whose duties are prescribed, by acts of Congress, occupies a different and higher position in the executive department of the general government, than that occupied by the commissioner of the general land office of the state of Texas, towards the executive department of the state of Texas since the adoption of the constitution of 1869, in which he is expressly named as one of the executive officers? Is he still to be treated by the courts as a mere ministerial officer, all of whose official functions, of the highest and most complex character, can be controlled by the courts of this state? He is as independent in his position as the governor is, and has a separate line of duty as plainly marked out. His department is equally important with any others. He has the highest title to office that it is possible to confer in this country, by a designation in one of the three departments in the constitution, and by an election by the qualified voters of the whole state. Authorities might be cited to show the view of other courts as to the necessary effect of an officer deriving his authority by designation from the constitution. One only as a sample: The People v. The Canal Board, 13 Barbour, N. Y. R. 438. But why call in aid to confirm that which the constitution itself positively affirms? So far from this change being made without a purpose by the framers of the constitution, it is in accordance with the settled tendency, that has been growing and increasing its manifestations in public acts for the last half century, to lessen the direct power and influence of the chief executive, by securing the independence of the heads of departments. All public history attests the fact, that constitutions, laws and decisions of courts, and the construction of all of them, are progressive, as public events arouse to action great minds, in impressing and infusing their views into them. Two such events did occur, forty years ago or over, in the public history of this country, which excited a universal interest and great conflict of opinion as to what were, and what should be, the relations between the different departments of republican government. It was an undeveloped issue, which had been long forming that then blazed forth. One of them resulted in fixing strongly in public sentiment the doctrine, that the courts have a controling power, to a certain scarcely definable extent, over the executive department or some of its officers; and that the decisions of the courts of last resort constitute the law—binding on the other departments. This has borne all along many fruits in most, if not all of the states, and lately some very bitter fruits in a few of them. See "Durell case" in Louisiana, and cases in Arkansas and Texas, not yet reported, wherein civil war was the result in two, and nearly reached in the third state. The other event referred to was made the means of exciting a serious apprehension of danger, from uniting "the sword and the purse" in the hands of the chief executive; which resulted in the effort to secure the independence of the different departments, as far as practicable, from the direct control of, and discretionary removal by, the chief executive. This has continuallv manifested itself ever since in the constitutions of many of the states, whose constitutions have been formed or amended since that time, by naming the several heads of departments with the chief executive. See constitutions: New York, 1846; Maryland, 1851; Virginia, 1851; Kentucky, 1850; Ohio, 1851; Indiana, 1851; Florida, 1838; Arkansas, 1836; Iowa, 1846; California. Whereas, many of the older constitutions are conformable, in this respect, with some variations, to the Constitution of the United States. This sentiment culminated in the passage of the "Tenure of Office Bill" (as it is called) by the Congress of the United States, very shortly after which this constitution was framed and adopted in Texas, in 1869. It would be a very unwarrantable presumption to conclude that the framers of this instrument did not appreciate and act upon this prevailing sentiment, when they have in a manner so unusual and so pointedly declared that "the executive department of the state shall consist of a chief magistrate, who shall be styled the governor, a lieutenant governor, secretary of state, comptroller of public accounts, treasurer, commissioner of the general land office, attorney-general and superintendent of public instruction," and then devoted a separate section to each one, defining distinctly his position and duties in the executive department of the government. To be required to say that this constitution does not make for this state a divided executive department, with the several heads thereof independent of the others, and still each one in his own sphere of duty vested with a constituent portion of the supreme executive powers of the state, by force of a line of decision of this court, made under a constitution that did not do this, as to the commissioner of the general land office, and contrary to the decisions of the Supreme Court of the United States, wherein the commissioner of the general land office, created by statute, is treated as one of the executive departments, by reason of his connection with the president, in the discharge of his official duties—would be, as it is respectfully submitted, to place the authority of previous precedents above the constitution, and, in effect, to adopt a doctrine similar to that of Lord Coke, as declared in Doctor Bonham's case, while Chief Justice of the King's Bench, "that the common law doth control acts of parliament, and adjudges them void, when against common right and reason." 1 Kent Com. marg. p. 448; 8 Co. 118.

With the evils of such a system of divided executive department, we have nothing to do as a court. Some of them were alluded to long since in a decision of this court, delivered by me: The State v. The Southern Pacific R. R. Co. 24 T. R Bishop, whose philosophic explorations into and expositions of the science of the law has placed the bench and bar under many obligations, has suggested some appropriate rules by which to determine the weight of authority. "1. Whatever may be the language of the judges, the decision, as a precedent in the strict sense binding in future cases, extends no further than the facts involved in the case as appearing in the record. 2. It is not binding as to any matter to which the mind of the court did not advert, even though within the record. 3. It is not binding as to any point not necessary to be passed upon in order to decide the cause. 4. As to the reasons given by the judges in passing upon the questions necessarily involved in the cause, and strictly within the record, these are in a qualified sense to be regarded as the law of the case, but they are not absolutely so." Bishop's First Book of the Law, 394.

These rules may deserve consideration in reference to what follows, without being repeated, as well as to that which has already been exhibited in this opinion.

Under the state of the law, and of the constitutions, and the material change of the constitution in reference to the commissioner's position in the executive department, as have now been brought to view, together with the former decisions of this court in relation thereto, the conclusion, it seems to me, is inevitable, that he stands in that department as the equal of the governor, and of the other high executive officers, and independent of them in his own sphere of action; and that if the statute of this state did authorize the courts to pass upon and revise all of his official conduct, treating him as only a ministerial officer when those decisions were made, the constitution has lifted him from that inferior sta-

tion, and that now his official acts requiring judgment and discretion can no more be directed and controlled by the courts than those of the other heads of the executive department.

There are other considerations rising above the mere critical construction, of words in laws and constitutions and pertaining to the history and intrinsic nature of the thing itself, that fixes, beyond the possibility of a doubt, that the issuing of a patent to land is a high official function, done exclusively in the exercise of the executive department of the government. In past time, when the sovereign was the owner of the vacant domain, his grant was an absolute investure of title, as in case of William Penn and Lord Baltimore. When republican governments were formed in America, the unappropriated vacant lands belonged to the people of the states, as bodies politic, and afterwards much of it to the government of the United States. Universally, at least without any known exception, such lands have been granted, under provisions of the constitutions and laws, devised for the purpose, through the executive head of the government, state or federal, aided by such officers as might be associated with, or placed under him, in the executive department.

Again, there is such a thing in legal science, as well as in natural philosophy, as that of fixing the position and class of an object in a system, by the nature, qualities and attributes of the thing itself. By such a process of examination, there is no escape from the conclusion that the act of issuing a patent is the exercise of an executive function. The instrument upon its face bears the indelible impress of an executive agency, acting for the body politic organized—the state. Like most executive acts, it only imports, in legal effect, *prima facie* right, which may be enquired into, not having the conclusive force of a law passed, or a judgment rendered. It neither concludes the state nor individuals, when issued under a defect of right, and to the prejudice of prior vested rights. Smith v. Power, 2 Texas R. 72; Tapping on Mandamus, 440.

If the judgment had been rendered in favor of Wright, and the patent had issued under it, it would not have vested in Wright any higher title by virtue of the judgment, than if it had issued without the mandamus. The state is no party to the suit, nor are other individuals who may have an interest. It is a matter simply between Wright and the commissioner. The commissioner does not own the land, and a judgment against him for Wright, recovers nothing but a writ—a writ to force an executive officer to perform an executive act, in the usual course of his official business. Tapping, speaking of the effect of such a judgment in a similar matter, says: "It neither gives a right nor concludes one; it confers no title *per se*, but merely a legal capacity to assert one," etc ,440. If Keuchler dies or gets out of office before the writ is executed, the judgment is dead also. U. S. v Boutwell, 17 Wall. 609. See Id. v. McGarrahan, 9 Wall. 313. It has more the attributes and qualities of an investigation for contempt of court, than a personal action at law to recover a private right withheld by an officer. The issuing of a patent may be shown not to be a ministerial act, by presenting as nearly as practical what has been regarded as a ministerial act by the Supreme Court of the United States, by which the difference may be plainly seen. It now, therefrom, remains to be seen whether or not the laws of this state do, or may impose a duty upon one of the heads of the executive department to perform any act which may be properly denominated ministerial in its character, in contradistinction to an ordinary official executive duty, and which the courts, being of another department of the government, can force him to perform against his will, through the proceeding of mandamus, or any other process from the courts; and if so, is it possible that the issuing of a patent by the commissioner of the general land office, in a case like the present one of Keuchler v. Wright, can possibly be such an act?

The legal mind, not only in this state but in all of the states, as shown by their decisions, is directed to the decisions of the Supreme Court of the United States as the source of light on that subject, and when they are examined it is found that whatever power the courts have to draw such a distinction between the several acts of an executive officer, and to compel the performance of those adjudged to be ministerial, is derived from the principles of the common law, as applied to our system of government, through the power of the courts to issue the writ of mandamus.

It is proposed now to see if, in importing the common law across the Atlantic, this high prerogative writ of the King or Queen of England, "one of the flowers of the crown," has, in the distribution of the powers of government, been placed by the framers of our constitutions in the judicial department in its full proportions and vigor, as it existed at common law in the Court of King's Bench in England. For we have not adopted the English statutes regulating it, as a remedy somewhat analagous to an ordinary action at law, requiring a judgment, and allowing a writ of error; all of which did not exist at common law, any more than in a proceeding for contempt of court. Tapping, 472–490; 1 Chitty's Gen. Prac., 791.

The powers of government in England have been distributed by immemorial custom and precedent, mutual adjustment and adaptation, without any written constitution defining the distribution. For the present purpose it is sufficient to say that parliament enacts the laws, and the king executes them through the agencies, from time to time, used for that purpose. The power of the king to execute is commensurate with the power of parliament to enact laws. There is no limitation in the extent of the power to execute, but only in the means to be used, which have by degrees fallen into particular agencies, and regulated forms. In early times much of this was done directly by orders of the king and his council, some of which are still extant, signed "*per Regem et Cons.*" But he used this means of suspending laws, as well as of executing them, and as it grew into disfavor, the cabinet or ministers of state, the courts of chancery, and of king's bench enlarged their powers so as to accomplish the same objects in a manner better regulated, and with more justice to the subject. Through these three channels, the executive power of the government was exercised, except so far as it was entrusted to inferior tribunals, all of whom were in some way under the control and direction of these high agencies. The Court of the King's Bench, where the king was supposed to preside, as doubtless he did in exercise of merely judicial functions, but by the use of the writ of *mandamus* (which is the language of royalty itself), could cause "any person, corporation or court of judicature" to perform any duty required of them by law. It is said to be founded on *magna charta*, wherein the king had pledged himself that there should be no failure or refusal of justice and right. It was used as "a supplementary means of substantial justice in every case where there is no specific legal remedy for a legal right." Tapping, 62. That is, it filled up the vacuum whenever there was a deficiency in the execution of the laws on account of a right not coming under the regular forms of procedure in some of the courts of law or equity. There could be no need of issuing the writ to the ministers of state, or to those officers under their direct control and direction, and it was not done, because the king could have the laws executed in those executive departments through another channel than a resort to the king's bench, and avoid the necessary confusion consequent upon such an attempt. It does not lie against the king, because obedience must be enforced by attachment." Neither will it lie to command the officers of the crown, as such (Tapping, 161), nor against lords of the treasury (Ib. 315), nor commissioners of customs (Ib., 164), nor against superior courts (Ib., 161). "A peremptory mandamus is not a judicial writ, founded on a record, but a mandatory writ, which the Court of B. R. issues when it is satisfied of the prosecutor's right." Tapping, 437. In its exercise there, the question of whether or

not the act is ministerial is not always the test of the grant of it. "Thus the court will not grant the writ where a matter is left to the discretion of an individual or body of men, which discretion has been exercised, and no ground appears that it has been done wrongfully." "When a discretion is given, by it is understood a sound discreiton, for the Court of B. R, has power to, and will redress things otherwise done." It must be a public duty, the performance of which is enforced, for when it is private, other remedies are adequate. Id. 64-5. It was not for the want of power that the writ was not issued in many cases where it was refused, being discretionary, and not a writ of right, because of a respect for other tribunals, or because it would produce conflict and confusion in the execution of the law. Still it is evident that the power was and still is exercised over a great many subjects that might not readily be considered strictly judicial, and it was exercised by virtue of the guardianship and control of the crown over all public institutions, tribunals, offices, corporate bodies and corporations within the kingdom, as a royal prerogative, never yet surrendered. What would be thought in this country of a writ of mandamus issued by the district court, to compel a railroad company to proceed in making its road; or to the trustees of a graveyard to admit a citizen to be buried in a public burial ground; or the judge of the Travis County District Court, taking a personal view of a steam-plaining shop in the city of Austin, and upon his own disgust at the noise, smoke and handling of plank on the side-walk, should issue a writ of mandamus to abate or suppress it, as a public nuisance? Yet such are the extraordinary powers that the court of king's bench can and does exercise by authority of the common law in England. Tapping, 293, 108, 220.

The matters to which special attention is invited are, that this great power of the Court of King's Bench was largely executive in its character, and as claimed with apparent pride by some of the iudges, was exercised by that court in virtue of the king's prerogative, to execute the laws in cases not falling within their judicial functions, and yet they did not issue the writ to the king's ministers or to their subordinate officers. The powers of government were not divided as here, into three distinct bodies of magistracy, but as to the persons exercising power there was a peculiar admixture in the exercise of their powers. The fact that the House of Peers constituted the High Court of Appeals, and not the king himself, tended to establish an independent judiciary, as far as practicable, consistent with its appointment by the crown, which having been long fostered by the greatest talents of the country, suggested the idea which was incorporated in American constitutions, in the creature of a separate and independent department styled the judicial department, to be co-ordinate with the legislative and executive departments. In doing so, the question may now be asked, to which dspartment was this extra-judicial portion of this high prerogative power of the Court of King's Bench confided? Although there seems not to have been any express separation and re-appropriation of that power as exercised by the Court of King's Bench, the failure to do which has continually produced, and still produces, perplexity and uncertainty in adjudications in relation to them. Still, it is surely safe to say that that portion of the power of the crown which was entirely executive in its character, that was exercised by his ministers of state, was given certainly and exclusively to the chief executive, and to such officers as might be associated with him in the executive department of the government. If this be correct, the conclusion would inevitably follow that our courts, to whom have been confided only judicial powers, cannot compel the heads of the executive department to perform any of their executive functions.

The practice of the government of the United States for over three-fourths of a century, is the highest authority that could be adduced in favor of that position. During all that time, the President, made by the constitution the chief executive of the government, has controlled the heads of the executive departments provided for his aid by laws of Congress, in the exercise of their official functions in the execution of the laws, even to the extent of removing some of them to carry out his construction of them. His judgment and discretion have been the finality—the final determination, of last resort, in reference to the rights of individuals arising in and pertaining to that department, without the interference or aid of the courts in ordering and directing as to the manner in which they should be disposed of by any of the heads of the executive department, with one solitary exception, if that can be regarded as an exception, which was in the mandamus case of Kendall v. The United States, 12 Peters, 524.

In that case, as well as in the case of Marbury v. Madison, where the writ did not issue only for the want of jurisdiction, such interference and control by the court of the official functions of the heads of the executive department, in the exercise of the powers confided to them by the constitution and laws, was expressly and most earnestly disclaimed.

Chief Justice Marshall says: "With respect to the officer to whom it would be directed, it is not wonderful that in such a case as this the assertion by an individual of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some as an attempt to intrude into the cabinet and to intermeddle with the prerogatives of the executive.

"It is scarcely necessary for the court to disclaim all pretentions to such a jurisdiction. An extravagance so absurd and excessive, could not have been entertained for a moment." Marbury v. Madison, 1 Cranch, 279.

Again, in the same case, it is said: "By the constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discrecretion, and is accountable only to his country, in his political character, and to his own conscience. To aid him in the performance of those duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion."

Speaking of the secretary of state, he says in this connection: "This officer, by that act (meaning act of Congress), is to conform exactly to the will of the President. He is the mere organ by which that will is communicated. The act of such an officer, *as an officer*, can never be examinable by courts." Ibid. 277.

The opinion proceeds to argue that the commission had been completed by signing and sealing, after which no further official act was necessary; the right was vested, the paper was the evidence of his right, the delivery of it was a personal act.

To enforce that act the writ would lie. But how does the learned chief justice show that the secretary of state was a person to whom the writ could be directed? He could not do that from the common law of England, upon which the general right to the writ, as a remedy, was based. No precedent in England or America was cited for it, nor, as it is believed, could it have been cited. He informs us himself as to this, which may here be seen. He says: "The act to establish the judicial courts of the United States authorizes the Supreme Court of the United States to issue the writ of mandamus in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States. The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description," etc., p. 281.

The only point really decided in that case was, that that very law was unconstitutional, on account of its attempt to confer original jurisdiction on the supreme court.

The case of Kendall v. U. S. came up on appeal about thirty-

five years afterwards, and in its decision, this matter of basing the right to issue the writ, on this unconstitutional statute, does not seem to have been noticed at all. In the case of Kendall v. the U. S., where the writ was issued to compel an allowance of a "credit," the court say: "We do not think the proceedings in this case interfere in any respect whatever with the rights or duties of the executive, or that it involves any conflict of powers between the executive and judicial departments of the government. The mandamus does not seek to direct or control the postmaster-general in the discharge of any official duty, partaking in any respect of an executive character, but to enforce the performance of a ministerial act, which, neither he nor the president had any authority to deny or control." But suppose that the president had assumed the authority to order the postmaster-general not to enter the "credit," and the court had *ordered* (mandamus) him to enter the "credit?" Which ought he to have obeyed, the president or the court? It is unfortunate that that question is not directly presented and solved in the opinions in either of the two cases. President Van Buren, though applied to in that case, would not "commit" himself by ordering the postmaster-general to give the credit or not to give it, and therefore the issue was not made, and that question remains still undecided up to the present day by any direct decision of the Supreme Court of the United States. The first opinion (in Marbury v. Madison) does not name the act to be enforced by the court, but says it is not an executive act. The second opinion (in Kendall v. U. S.) styles the act to be enforced by the court a ministerial act. A case where the question is again fully discussed is United States v. Guthrie, 17 Howard. In the opinion, the acts that can be enforced are described to be acts "rather extraneous, and required rather of the individual than of the functionary." In the case of the United States v. Boutwell, 17 Wall. 609, it is held to be an act so attaching to the person, and not to the office, that upon the resignation of the officer against whom the writ issued the suit abates and is dismissed. See also Sec. v. McGarrahan, 9 Wall. 313. Reese v. City of Watertown, 1 CENTRAL LAW JOUR. 161.

The origin and source of this distinction as to ministerial acts, and other acts of an executive official character, as specially applied to the heads of the executive department, derivable from the principles of the common law, have been sought for in vain.

It may, however, be deduced from those cases in the Supreme Court of the United States, that an executive official act of one of the heads of the executive department, is an act performed by him in the exercise of the executive powers of government confided to him by the constitution and laws.

What is called a ministerial act of one of such officers, in contradistinction to an executive official act, is a personal act devolved by law on him as an individual, and not as an officer, by reason of his being the person who happens to hold that office at the time the act is required of him.

It is said in those leading decisions, that this ministerial act is one which the President has no authority to forbid to be done, and which the law imposes directly upon the officer, and which makes him "the officer of the law." Marbury v. Madison, 1 Cranch, 277.

The act, according to this, is an act of an executive officer, which is still not an executive act, but is an act of an executive officer, that is, an act of an officer of the law.

"An officer of the law" is a designation unknown to our constitution. In a large sense, all of our officers are officers of the law, and are bound to obey it. But that does not in the least degree indicate who it is, or what tribunal it is, that is to bind them, to order them, to coerce them to *obey the laws*. That, at last, depends necessarily upon what department of the government they belong to in our constitutional division of the powers of government.

Authorities from other states have not been cited or discussed, because they are conflicting, and their decisions have often been made with divided courts, like those in the Supreme Court of the United States; further, because they are all streams from the same fountain, to wit: the decisions of the Supreme Court of the United States.

Now it would seem to be very obvious that this act, that is denominated a ministerial act, that has called into requisition all the powers of speech of the most learned jurists of the last half century to convey a remotely definite idea of it, whatever may be its character, bears not the least resemblance to the executive functions of the commissioner of the general land office, necessarily performed by him in such a case as the one now before us, involving at every step questions of law and of fact necessary to the performance of the final act on his part in issuing the patent. I have not stopped to notice his association with the governor in the performance of this act, which seems to be an additional ground of objection, according to the authorities cited in similar cases in the Supreme Court of the United States.

As to what should be our determination should a case arise when the act required to be done bore any reasonable analogy to what is called a ministerial act, then it will require a serious consideration of how far the weight of authority will control the rigid principle depending upon the constitutional division of the powers of our state government. If this writ is to be used as a remedy for the assertion of private rights in this state as to the heads of the executive department, it should be regulated by provisions in the constitution, and also by statutes, as it is in England.

I have no hesitation in giving it as my own opinion now, that the court should on such issues be governed by, and follow the logical deduction to be plainly drawn from the division of the powers of government between the distinct departments in the constitution of the state.

Each department should be made to rely upon its own wisdom and judgment in the exercise of all the powers confided to it by the constitution, independent of the control of the others, pending the performance of its official functions, and should be solely responsible for its own action, and that thereby the final separate independent action of each would operate as a check upon the excess of power that might be assumed by others.

The judicial department is not that power to which has been confided the high trust, by any such interference in the official conduct of the others, to regulate the harmonious action in the machinery of our state government.

Such regulating power is only found, and in a republican goverment should only be found, in the direct representatives of the people of Texas, in the senate and the house of representatives of the legislature, by the action of two-thirds of whom, through the power of "address," and "impeachment," the governor and the other heads of the executive department, and the judges of the courts, and other officers whenever their conduct may make it necessary, in order to prevent jarring conflicts, and to secure a good government, for the protection of the rights and liberties of the people of the state.

The authority for the exercise of this power, assumed by the courts, to control the conduct of the heads of the executive department in the isolated and exceptional instance of what is called a ministerial act, however it may have since been extended in many of the states from a difference of opinion as to what constitutes such an act, is founded on, and traceable to the *dictum* contained in the opinion of the Supreme Court of the United States in 1803, in the case of Marbury v. Madison. It was delivered by Chief Justice Marshall, who is universally regarded, as it is believed, as the greatest lawyer America has produced. And that was emphatically a *lawyer's* opinion.

Why, may it be asked, should the court continue to follow in the train of a line of decisions that originated in a useless *dictum*, that seeks to make such an infinitesimal exception to a broad,

general rule, and thereby break down a general principle by a breach that opens the door of intrusion, and gives to the intruder the right to determine the extent of his power to intrude through the breach he has himself assumed to make, making an exception, the exact limits and boundaries of which the ablest jurists have never been able to convey a definite idea, with anything like consistency and uniformity, which is liable at any time to produce internal conflict and confusion, and which has almost continually been adopted with dissent and dissatisfaction?

The circumstance and remarkable juncture of public affairs under which that dictum appeared in the opinion, thrust themselves into the estimate of its weight as authority, as no practicable purpose can be found in the opinion itself, for so labored an argument to prove what was not necessary to decide the case.

As to all that part of the opinion not relating to the appellate jurisdiction of the court (which was the real matter in issue), it is a most ingenious argument, made gratuitously in a judicial decision, under the sanction of the highest judicial tribunal of the country, thereby attempting to give to it the sanctity of the judicial ermine—unassailable from habitual and traditional respect—to stand in a high place, as a perpetual memorial of the assumed outrageous abuse of official authority in the alleged deprivation of a private right of a citizen by the executive department of the government of the United States then in power.

Mr. Madison, then secretary of state under President Jefferson, who stood pre-eminent amongst the great men that framed the constitution, and who may be supposed to have understood its meaning, and to have desired its preservation equally with any one else, treats this effort on the part of the court to interfere with his official conduct, with—silence—(not to use a stronger term) in not answering to it; still he was not attached for contempt for not making a return to the writ, or otherwise making an answer in court; but instead of that, as it appears from the report of the case, some of the clerks of the secretary's office were picked up and brought into the court, from whom, it may be presumed, the facts were established upon which the argument, in that part of the opinion, was founded. It was surely not necessary to ascertain any fact whatever, except the application itself, of the relator Marbury, that it was an original suit, and not an appeal upon which fact alone the decision of the case was based and judgment rendered. And I borrow from him the reason why such an opinion so delivered should not be followed as a precedent, which is contained in the same opinion; that this is, or at least should be made to be, what he says it has been termed, "*a government of law and not of men*," and I will presume to add, that it is high time that the judicial idolatry for a name, however great and deserving, should begin to cease in this country, by which a *dictum* of any court has been made the law of the land.

I will close this opinion in the words of Sir William Blackstone, equally eminent for his great learning, and for his profound knowledge of the science of law and of government, as fully expressing my own mature convictions as applicable to this, and to all such cases, which is that:

"NOTHING IS MORE TO BE AVOIDED IN A FREE CONSTITUTION, THAN UNITING THE PROVINCES OF A JUDGE AND A MINISTER OF STATE"

—IN the case of McKeon, a bankrupt, recently heard before Judge Blatchford, of the United States District Court for the Southern District of New York, it appeared that in November, 1874, McKeon filed a voluntary petition in bankruptcy, and was adjudged a bankrupt. He afterwards affected an arrangement with his creditors, under section 17 of the amendment of 1874, for a composition, and the court confirmed the arrangement. McKeon then petitioned the court for a release and restoration of his property and books, in order that he might resume business, regain his standing and credit in the community, and thereby be enabled to carry out the terms of the compromise. Judge Blatchford declined to grant the petition.

Eminent Domain—Taking Land for Railroads—Entry Before Payment of Damages—When Owner May Maintain Ejectment.

THE SAINT JOSEPH & DENVER CITY RAILROAD COMPANY v. CHARLES T. CALLENDER.

Supreme Court of Kansas, November 24, 1874.

Hon. Samuel A. KINGMAN, Chief Justice.
" David J. BREWER, } Associate Justices.
" D. M. VALENTINE, }

[By the Court—BREWER, J.]

1. **Taking Land for Railroads—Compensation must be first paid.**—Full compensation must be first made in money, or secured by a deposit of money, before any right of way can be appropriated to the use of a corporation.

2. ——. ——. **Appeal by Land-Owner from Assessment of Damages.**—This imperative rule of the constitution, is not relaxed by the fact that the land-owner has appealed from the assessment of his damages by the commissioners, nor by the fact, that on such appeal, he has recovered a judgment for the amount thereof.

3. ——. ——. **When Land-Owner May Maintain Ejectment.**—When such judgment for damages is not paid, and it appears that pending the appeal, the railroad company entered upon his land, and constructed its road, and it does not appear that the land-owner had any actual knowledge of such entry and occupation, or in any manner consented thereto, a judgment in favor of the land owner, in an action of ejectment, for the recovery of possession will not be reversed. All the justices concurring.

By the court:

BREWER, J.—The facts in this case are briefly as follows: In June, 1871, the plaintiff in error commenced proceedings to condemn the right of way through lands of defendant in error, situate in the county of Washington. Commissioners were duly appointed, who assessed the damages at $66.10. This amount was deposited with the county treasurer. All these proceedings were regular and conformed to the statute. Dissatisfied with the award of the commissioners, Callender appealed to the district court, and in August, 1872, obtained a verdict and judgment for $1200. Notwithstanding the appeal, the company entered upon Callender's land, constructed its road-bed, track, etc., and is now using it for the running of its trains. Upon the taking of this appeal by Callender, no bond was filed by the company as required by section 1 of chapter 74 of laws of 1870, and no other money has ever been paid or deposited than the $66.10 awarded by the commissioners. The judgment of the district court remains unsatisfied. In March, 1873, Callender commenced an action of ejectment to recover the possession of the land taken by the company. The district court rendered judgment in his favor, and of this judgment plaintiff in error complains, and by this proceeding in error now seeks its reversal.

Upon the facts, as above stated, was Callender entitled to recover? The constitution, art. xii. sec. 4, provides that "no right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by a deposit of money, to the owner." The amount of compensation to which Callender was entitled, has been finally determined to be $1200. This has not been paid nor secured by a deposit of money. The right of way has not, therefore, been appropriated to the company, and Callender is still the owner and entitled to the possession. As against this it is insisted that Callender has obtained and still holds a judgment for the damages, and that if permitted to recover in this action he will have both the land and a judgment for damages for its appropriation; that he stood by for nearly two years and permitted the company to occupy and expend large sums of money in improving this land, and that, therefore, it is too late for him now to question its right to occupy; he elected to pursue his remedy for damages and must abide by that election. So far as regards the first part of this objection, it is enough to say that the recovery of possession would operate as a satisfaction of the judgment for damages, and any attempt thereafter to enforce

its collection would be restrained and satisfaction ordered to be entered of record. Nor could the plaintiff assign his judgment so as to subject the company to double loss; either his assignment would be so far a guaranty to the assignee of an irrevocable right to enforce the collection of the judgment, as to estop him from disturbing the company's possession, or else the assignee would take the judgment subject to the risk of having it satisfied by the assignor's recovery of possession. This judgment is simply the final determination, in the manner pointed out by the statute, of the amount to be paid for the right of way. By payment, the right of way passes to the company; without it, nothing passes.

In regard to the latter part of the objection, it may be remarked that the record shows no formal assent to, nor even any actual knowledge of, the occupation by the company. The evidence is not preserved, and we have simply the pleadings, findings and judgment. True, the court finds that Callender was the owner and in possession prior to the entry by the company; but this may mean that constructive possession that follows title, or it may mean possession by tenant. It does not necessarily import actual occupation or actual knowledge of the company's entry and improvements. Now, a party ignorant of another's entry upon his land, and expenditure of money and labor in improvements thereon, can hardly be said to have acquiesced in such entry and improvements, as to be estopped from thereafter setting up his own rights to the land.

But conceding that possession, as stated in the findings, means actual occupation and implies actual knowledge, and still we think the doctrine of estoppel will not help the plaintiff in error. Both the company and land-owner act with knowledge that the right of way cannot be appropriated until full compensation therefor has been first made in money or secured by a deposit of money. Of course this deposit must be such as *secures full* compensation. A deposit of $66.10 does not secure full compensation for $1200 damages. The company initiates the proceedings and summons the land-owner before a tribunal for the assessment of his damages. All the proceedings are in conformity to law, and the assessment is made an assessment in this case, as appears from the verdict of the jury, grossly inadequate to the actual damages sustained. All that the land-owner can now litigate, so far as these condemnation proceedings are concerned, is the amount of damages. There is no secret defect in these proceedings which he is now for the first time springing upon the company, ignorant of its existence. He concedes that all is regular. He initiates no new proceedings, but simply pursues those already initiated by the company. If he does not appeal, the company acquires the right of way, and he must be contented with the award of the commissioners. Hence, it seems hardly fair to say that he elected to pursue a mere claim for damages, and waived all his rights to the land. By his appeal, however, he gives notice to the company that the amount awarded is not full compensation, and that more must be paid before any right of way is appropriated. If, after this notice, and without his consent, the company sends its workmen on his land and builds its road, what room is there for the application of the doctrine of estoppel? There is no misrepresentation, no concealment on the part of the land-owner. The company acts with full knowledge of his rights and claims, and its own obligations. It was a trespasser, *abinitio*, and ought rather to atone for its trespass than to attempt to make the trespass a means of wresting the land-owner's property from him without compensation.

The case of Dater v. The Troy T. & R. R. Co., 2 Hill, 629, is strongly in point. There the act incorporating the company authorized it to condemn the right of way, provided for the appointment of commissioners, and the assessment of damages, and declared that if, upon the making of such assessment, the amount thereof was deposited to the credit of the land-owner, and notice thereof given to him, the company should then become seized of the land in fee simple. It also authorized an appeal from the assessment of the commissioners to the chancellor. Commissioners were appointed, the assessment made, the amount deposited, and notice given, all in conformity to the statute. The company then entered and took possession of the land. Dater appealed, and on the appeal a larger amount was awarded him. This amount not being paid, he brought ejectment, and the action was sustained. See also Loop v. Chamberlain, 20 Wis. 135; Henry v. The D. & P. R. R. Co., 10 Iowa, 540; Richards v. The DesMoines V. R. R. Co., 18 Iowa, 259; McClinton v. The P. Ft. W. & C. R. W. Co., 66 Penn. St. 404. We are aware of decisions seemingly adverse to the views here expressed. Among them are, McAulay v. The W. V. R. R. Co. *et al.*, 33 Vt. 311. Goodin et al. v. The C. & W. Canal Co. *et al.*, 18 Oh. St. 169; and a late case, Provost v. C. R. I. & P. R. R. Co., decided by the Supreme Court of Missouri, and reported in 1st CENTRAL LAW JOURNAL, 509. Yet these cases are not exactly parallel with this. In the opinion in each of those cases, stress is laid on the fact that the land-owner had full knowledge of the acts of the company in entering upon his land and constructing the road. In the first case, the occupation had been continued some eight years before the action was brought. The land-owner had, prior to any occupation by the company, signed an agreement to take stock of the company in payment of his damages, an agreement which he subsequently seemed anxious to avoid. In reference to which the court says: "He does not seem to have insisted thatthe first appraisal should be deposited during the pendency of the appeal, and before the work proceeded further. His great desire seems to have been that the damages should be agreed upon, and that he should be released from all claim under the written agreement to accept stock. To this extent his remonstrances were loud and sufficiently intelligible." It appeared, also, that after the damages had been finally ascertained, the stock therefor was duly tendered and refused. It would seem a reasonable inference from the facts, as stated in that case, that the land-owner had waived his right to insist upon pre-payment. In the second case, the plaintiffs were stockholders in a canal company. A railroad company desired the bed of the canal for its railway track, and the canal company being much embarrassed, the president of the railroad company bought up a majority of its stock at very low rates, put in a new board of directors in the interest of the railroad company, and then the directory of the two companies, by agreement, and without referring the matter to any commissioners or jury, fixed the damages to be paid to the canal company at a grossly inadequate sum. The railroad company took possession of the canal, constructed its road, and was in full possession, operating its trains, etc., when the plaintiffs brought this action, asking that the pretended sale or condemnation be set aside, and the railroad company enjoined from further use of the canal-bed. The supreme court conceding the invalidity of the sale, held that the plaintiffs were too late to obtain relief by injunction, though they might proceed to obtain full compensation. Quoting from a prior opinion, the court says: "Before a stockholder can be entitled to a remedy by injunction, against such departure from the original objects of the incorporation, he must have shown himself prompt and vigilant in the assertion of his rights as such stockholder. It will not do for him to wait until the mischief of which he complains is accomplished, fortunes expended, and great public interests created. If he does, he must be held to have acquiesced in the change, or to content himself with some other form of remedy." *Prima facie* this transfer of the canal-bed was valid. The regular officers of the canal company had executed the proper conveyances. Upon the faith of this apparently valid transaction, improvements had been made, and large sums of money expended. The invalidity of the transfer grew out of the bad faith of the officers of the canal company. If the stockholders did not interfere, at the first possible moment, to prevent the wrong attempted by their officers, and to prevent innocent parties from expending money on the faith thereof, it might well be that equity would refuse to interfere further than to secure them adequate

compensation. The case from Missouri is more nearly parallel. Indeed, the only important difference is, that in that, it appears that the land-owner was present all the time and had full knowledge of the company's operations in entering upon, and constructing its road-bed over, his land. His failure to object to this, was held a waiver of his right to recover possession. Though it was said that "a court of equity would unquestionably interfere, if necessary, and place the road in the hands of receivers until the damages were paid from the earnings."

It may be remarked, in reference to each of these cases, that the constitutions of those states have no such stringent imperative provision as is found in ours. At any rate, we cannot assent to the doctrine, that while litigating in a proceeding which the company has instituted, the amount of damages to which he is entitled for the appropriation of his land to its use, the land-owner must also resist by force, or judicial proceedings, the entry upon his land, or lose the plain remedy which ordinarily accrues when another party is found in wrongful possession thereof. The Judgment of the district court will be affirmed. All the justices concurring.

Notes and Queries.

CAN THE LEGISLATURE OF A STATE EMPOWER MUNICIPAL CORPORATIONS TO AMEND THEIR OWN CHARTERS?

EDITORS CENTRAL LAW JOURNAL:—The question submitted by G. and S., through the JOURNAL, for November 20th, page 586, has enlisted my attention and interest, and after some consideration I may be permitted to advance the following opinion:

The constitution of Texas prohibits the legislature from passing *local* or *special* laws, "incorporating cities or towns, or changing or amending the charter of any city or village," and "in all cases where a general law can be made applicable, no special law shall be enacted."

Under this constitution the legislature passed an act, empowering "any incorporated town or city," to amend its own charter "whenever in the judgment of the board of aldermen," an amendment becomes necessary or desirable. The statute further provides the manner of proposing and voting upon amendments, and requires a majority of the votes cast to be in favor of it. Section 4. of the act reads thus: "No amendments shall be proposed or submitted by any board of aldermen, which shall contravene, or be repugnant to the constitution or statute laws of this state."

Certainly there is nothing in the act contravening or repugnant to the constitutional provision relative to corporations, as quoted above. The only limit being that the law shall not be local or special. The law under consideration is very general in its terms, applying to all incorporated towns and cities that may desire to avail themselves of its provisions. In truth, we may reasonably infer that it was this worthy desire of the legislature to comply strictly with the consti, tation,—"not to pass a special enactment where a general law is applicable,"—that has led to the enactment of a law so general in its terms, not in its application, merely, but in its effects, as to raise the very serious question, whether or not a long recognized and well established maxim of constitutional law has been violated. That maxim, in the language of Judge Cooley, is this: "The power conferred upon the legislature to make laws, cannot be delegated by that department to any other body or authority. Const. Lim. 116.

We have, then, this question: Is the statute under consideration such a delegation of legislative power as to be contrary to the letter or the spirit of the constitutional provision vesting the law-making power in the legislative department alone? We assume, of course, that the constitution of Texas contains this provision.

Were we to accept the maxim above referred to, in its broadest and most general meaning, we should have no hesitancy in answering the question in the affirmative. But it will be found, upon further consideration, that this general principle is greatly modified and limited in its signification by other maxims and principles equally well established in the law. From the same respectable authority already quoted, take the following: "But fundamental as this maxim is, it is so qualified by the customs of our race, and by other maxims which regard local government, that the right of the legislature in the entire absence of authorization or prohibition to create towns and other inferior municipal organizations, and to confer upon them the powers of local government, and especially of local taxation and police regulation usual with such corporations, would always pass unchallenged. The legislature in these cases is not regarded as delegating its authority, because the regulation of such local affairs, as are commonly left to local boards and officers, is not understood to belong properly to the state." Const. Lim. 191.

A view into the history of the law of municipal corporations for the last hundred years, shows a constantly increasing tendency to extend the power of these organizations. From the time when the power of creating corporations was considered "a flower of the prerogative" until the present day, the idea of local self government has kept even pace with every other idea advancing free and liberal institutions and government.

Whether it be a delegation of legislative power, or whether such power belongs to the corporation by virtue of our customs and principles of government, it is needless to cite authorities to establish the fact that municipal corporations have, and exercise, many of the most important functions of government, and I am pursuaded that the same principle under which municipal corporations are empowered to exercise these important functions—such as levying and collecting taxes, exercising the right of eminent domain, passing ordinances, by-laws, etc.—would warrant the legislature in granting to corporations the power to alter or amend their own charters, limited in the manner set forth by the act of the Texas legislature.

The legislature, by this act, does not deprive itself of the power to control and supervise the municipality in the exercise of all its privileges and powers under the charter. Since the amendments proposed must always be in conformity to the constitution and laws of the state, the legislature, by negative or prohibitory laws, can limit the power of the corporation to any desired extent.

Practically, important amendments to city charters are seldom or never made by the legislature, without first consulting the wishes of the inhabitants thereof, or by making the amendment upon condition that a majority of the qualified voters shall be in favor of it.

This act of the Texas legislature does nothing more than this; nothing less. It empowers cities and towns, in the first instance, to propose and vote upon amendments which may be thought necessary by the board of aldermen. The amendments which the city or town may adopt can affect only those subject to or within the limits of the corporation.

The legislature does not submit the enactment to the vote of the people for approval or adoption. This, it is clear from the decisions, it is not competent to do; but the legislature may pass a law which depends for its effect upon the condition of its being accepted by those whom it is intended to benefit by the law. This distinction and the law relative thereto are very ably examined by Wagner, J., in the case of The State v Wilcox, 45 Mo. R. 458. We may, I think, apply the language of the court there used to the case now under consideration: "The law is complete and effective when it has passed through the forms prescribed for its enactment, though it may not operate, or its influence may not be felt, until a subject has arisen upon which it can act." From the decisions, I apprehend that the objection above suggested would not be sustained as to this law.

What limit, then, is there to the delegating of power to municipal corporations by the legislature?

If the constitution, in this respect, be silent, I can conceive of but two limitations. (1.) The legislature cannot deprive itself of the power to supervise and control all municipal corporations. (2.) The power granted to municipal corporations must be confined to local government.

Perkins, J., in the case of The City of Aurora v. West *et al.*, 9 Ind. 74, is authority for the following: "We think the proposition may be asserted that one government may act within the territorial limits of another, with the consent of that other." "Under republican governments where the political tendencies are centrifugal, tending to diffuse power among the members rather than concentrate it in the head of the body politic, we may expect greater powers of local government entrusted to the municipal corporations scattered over the state." Lafayette v. Cox, 5 Ind. 38.

"The constitution of the state of Indiana authorizes the legislature to create corporations and imposes no limit as to the powers to be conferred upon them: no clause confining their action to objects entirely disconnected with anything outside the corporate limits." "Under this constitution *the law creating the corporation will be the index to the powers with which it is endowed*, if the grant does not conflict with some other provision of the constitution than those above mentioned, or exceed the powers of the legislature itself." City of Aurora v. West, above cited.

When we consider, then, the purposes for which municipal corporations are organized, the powers with which they have been endowed, the constantly increasing tendency to extend those powers of the legislature to oversee and control them in the exercise of their functions, and, finally, that it is usual not to amend or alter the charter of a corporation unless desired by a majority of the citizens thereof, we are led to the conclusion that the law enacted by the legislature of Texas, was not only constitutional, but wise and judicious.

C. D. M.

Bloomington, Ill.

Book Notices.

A TREATISE ON THE LAW OF CONTRACTS. By WILLIAM W. STORY. In two volumes. Fifth edition. By MELVILLE M. BIGELOW. Boston: Little, Brown & Co. 1874.

This work, written by a son of Mr. Justice Story, and dedicated to his illustrious father, originally appeared in 1844. It has stood the test of time. It went to a second edition in 1847, to a third in 1851, and to a fourth in 1856. All the preceeding editions appeared under the supervision of the author, and each successive edition was enlarged and modified to bring it down to the time of its appearance. The present edition is distinguished by many valuable additions, and so extensive have been the changes that it is almost substantially a new work. Judge Bennett, it is stated, worked a year upon the preparation of the present edition, when he was compelled to relinguish it by reason of ill-health. Fortunately the work fell into the hands of Mr. Bigelow, whose previous labors have given the profession assurance that whatever he undertakes to do will be well done. Two new chapters have been added to the present edition, one on bills and notes, and one on telegraph companies. Three thousand additional cases, *coming down to the very latest date*, have been added, and there is no work in the language on the subject of Contracts which rivals the present edition of this work in comprehensiveness, except the excellent treatise of Professor Parsons.

We observe that Mr. Bigelow has taken obvious pains to give, with great fulness, the most recent English and American cases upon the subject of contracts. This is a marked and most valuable feature of the book. In this respect it gives the reader what he can find nowhere else so fully and satisfactorily presented.

A TREATISE ON EXTRAORDINARY LEGAL REMEDIES, embracing Mandamus, Quo Warranto and Prohibition. By JAMES L. HIGH, author of Law of Injunctions. Chicago: Callahan & Co. 1874.

The admitted excellence of Mr. High's Treatise on Injunctions, and the great favor with which it was received by the profession, made in advance a *prima facie* case for the present work, as in a generel way there is a considerable analogy between the extraordinary remedy of the court of equity, a writ of injunction, and the extraordinary remedies of the Common Law tribunals here treated of, namely, mandamus, quo warranto and prohibition. The latter writ, although extensively in use in some parts of the country, particularly in a portion of the Southern states, is not as important as the writ of mandamus and the proceedings by quo warranto or informations in the nature of quo warranto; and of the latter remedies mandamus is the one the most frequently needed to compel inferior courts, public officers and corporations to discharge the duties they owe to the public or to individuals. The author has, therefore, judiciously allotted the greater portion of his work to the subject of Mandamus, which he has treated with more fulness than any American author. It is well-known that Mr. Tapping's work is one of great merit, but much of it is of value in this country only by way of illustration of the learning pertaining to the subject. Many portions of it are practically inapplicable here, and it needs a thorough understanding of the structure and character of the old English corporations and public bodies to prevent an American lawyer or judge being occasionally misled by false analogies. We should ourselves very seriously object to any part of Mr. Tapping's work being omitted in a republication in this country, and yet we can appreciate the work of the present author, who has undertaken to give us the doctrines of the English cases so far as they have a practical value in this country. The every day lawyer can get a better idea of the English decisions from this book than he can from Mr. Tapping, and yet it is not to be implied that it will supersede that work. No American writer has treated the subject with any approach to the thoroughness and fulness of Mr. High, and there was room in our legal literature for the present work. We think we are safe in saying, that if an American lawyer can own but one book on the subjects here treated, it will hereafter be that of Mr. High. We have no hesitation in commending it to our readers as a treatise of great merits and usefulness. It bears throughout, the most indubitable evidences of the author's industry, skill and pains-taking care.

Summary of our Legal Exchanges.

WESTERN JURIST (DES MOINES, IOWA), DEC., 1874.

Witness Fees.—Harden v. Polk County, Supreme Court of Iowa, opinion by Beck, J. [8 West. Jur. 744.] The Iowa Code, § 3814, provides that "witnesses in any court of record shall receive for each day's attendance one dollar and twenty-five cents." Under this provision it is held that a witness who is subpœnaed in more than one case to attend court upon the same day, is entitled to the attendance fee and mileage for one day's attendance only. In Moffut v. Dubuque & B. R. R. Co., a similar ruling was made under a different statute.

Municipal Indebtedness—Constitutional Limit of, in Iowa, Applies to School Districts—School Orders not Negotiable—Defences against—Claims against School District must be audited—Rights of Assignee of Such order.—The National State Bank v. Independent School District of Marshall County. [8 West. Jur. 746.]

1. The constitutional limit for municipal indebtedness, of five per centum of the taxable property within the corporation (Art. 3, Sec. 2), applies to an independent school district.

2. Where a school district issued orders in excess of the constitutional limit, in payment for building a school house, it is invalid in the hands of an assignee; such orders are not negotiable.

3. Under Sec. 26, Chap. 172, Laws Ninth General Assembly, no order shall be drawn on the treasury of a school district until the claim for which it is drawn has been audited and allowed, and when the order was issued May 20, 1868, it is not cured by Chap. 98, of the Acts of the 12th General Assembly, which is retrospective only and was approved April 12, 1868.

4. The assignee of a school order issued in part payment for building a school house, and which was issued after the constitutional limit of indebtedness for the school district was exceeded, in an action upon such order, cannot by a simple change of the pleading, after the evidence is closed, recover for the cause of claim upon which the order was issued.

24 OHIO STATE REPORTS (ADVANCE SHEETS, FROM ROBERT CLARKE & CO., CINCINNATI).

Contracts against Public Policy--Betting on Election.—Lucas v. Harper. [24 Ohio State, 328.] By the court. During the pendency of an election for President of the United States, for which office H. G. and U. S. G. were opposing candidates, the defendant in error agreed to sell, and the plaintiff in error agreed to buy, a lot of hogs at the price of nine cents per pound, to be paid for when H. G. should be elected. The market price of hogs at the date of the contract was less than four and a half cents per pound. In pursuance of the contract, the hogs were delivered by the defendant in error to the plaintiff in error, who converted them to his own use. The election having resulted in the defeat of H. G., the defendant in error brought suit against the plaintiff in error and recovered the market value of the hogs. *Held:* 1. That the transaction was a wager. 2. That the hogs were delivered by the person losing the wager to the person winning, within the meaning of the act of March 12, 1831, S. & C. 664.

Rape—Evidence—Outcry after Prosecutrix Received Knowledge that the Act had been Witnessed by Third Persons.—McFarland v. State. [24 Ohio State, 329.] By the court. On the trial of an indictment for rape, the state called the prosecuting witness, who testified to the commission of the alleged crime, and afterward called another witness, who testified in corroboration of the prosecutrix, that soon after the offence was alleged to have been committed, the prosecutrix made complaint thereof in his presence. *Held:* That it was error to exclude, on the cross-examination of the last-named witness, testimony tending to show that, between the time the offence was alleged to have been committed and the time such complaint was made, the prosecutrix had been informed that the act of sexual intercoure, constituting the alleged crime, had been witnessed by other persons.

Action for Injuries Received through being Bitten by Vicious Dog—Measure of Damages—Care and Medical Attendance.—Gries v. Zeck [24 Ohio State, 329.] Stone, J. 1. One who, without his fault, is bitten by a dog, may, under the act of March 24, 1860 (S. & C. St. 71), maintain an action against the owner without averring or proving that the latter had knowledge of the vicious propensity of his dog. The rule of the common law requiring, in such cases, an averment and proof of *scienter* is abrogated by the statute.

2. In an action for injuries to the person, reasonable expenses incurred for care and medical attendance, made necessary by the injury, may properly be included by the jury in their estimate of compensatory damages, although such expenses have not been actually paid.

Code Pleading—Action on Fire Insurance Policy—Averment of Insurable Interest.—Peoples' Fire Ins. Co. v. Heart. [24 Ohio State, 331.] By the court. Where, in an action upon a policy of insurance, it appears from the petition that the insurance company, for a specified premium, executed and delivered a policy insuring A. against loss by fire, on specific property occupied by the insured, an insurable interest in the insured, under the code, is sufficiently shown.

Removal of Fixtures by Vendee who has given a Mortgage for Purchase Money—Liability of Purchasers of such Fixtures—Action to Subject Remaining Premises to Sale—Joinder of Purchaser of Fixtures as Defendants.—Smith v. Atleck. [24 Ohio State, 369.] Where A. sold lands, on which a distillery, with the necessary fix-

tures, had theretofore been erected, to B., by a written contract, which contained a stipulation, that upon the execution of the deed to B. he was to deliver to A. a mortgage on the premises sold, to secure the payment of the remainder of the purchase-money, and B. took possession of said premises under said contract. *Held:* 1. That B. had no right, while in possession of said premises, either under said contract or as mortgagor, to sever and dispose of the fixtures of said distillery, if thereby the security for the purchase-money was rendered insufficient. 2. That purchasers of such fixtures from B., chargeable with knowledge of the rights of A., he being guilty of no laches, are liable to A. for the value of such fixtures, if it be afterward found that the value of the remaining security is insufficient to pay the purchase-money due. 3. That in an action brought by A., either on the contract or mortgage, to subject the remaining premises to sale, to pay such purchase money, A. may join with B. in such action, as such purchasers, and subject the value of the fixtures purchased by them to the payment of any portion of the purchase-money that may remain due after the application thereto of the proceeds of the sale of said remaining premises, according to the inverse order of the time in which the purchases were made.

Rix, J., in delivering the opinion of the court, said: "Without attempting to determine the rights of vendees in possession of real estate, under contracts of sale, in ordinary cases, it is quite clear that under the contract set out in the amended petition in this case, the vendee had no right to change the condition of the property, in so far as the distillery and fixtures therein contained were concerned, without the knowledge and consent of the vendor. The record in the case discloses the fact that the fixtures of the distillery, after they were severed and removed therefrom, were of greater value than the remainder of the mortgaged premises, including the building in which the fixtures were at the time the contract of sale was made, and hence the reason for the provision in the contract, that the description of the real estate to be covered by the mortgage, should include the distillery and fixtures therein contained, is readily preceived.

"Under this contract, as to all persons having notice of its terms and conditions, the right of the vendor to subject the value of the fixtures purchased by such persons of the vendee, to make up any loss sustained by him on account of the diminution in value of the premises by reason of their removal the vendor being guilty of no laches, is as perfect as that of a mortgagee whose mortgage has been properly placed on record. In the latter case, it is held by the Supreme Court of Pensylvania, in Hoskin v. Woodward, 45 Penn St. 42, that the record of the mortgage affects the purchaser of a fixture from mortgaged premises, with the knowledge of the existing lien.

"The right of a mortgagee to recover of purchasers from the mortgagor, the value of fixtures severed and removed from mortgaged premises, whereby the value of the security has been diminished to the injury of the mortgagee, has been sustained by the courts of other states in the following well-considered cases: Hoskin v. Woodward, above cited; Cole v. Stewart, 11 Cush. 181; Van Pelt v. McGraw, 4 Comst. 110; Rogers *et al.* v. Gillinger *et al.*, 30 Penn. St. 185; Gore v. Jenness *et al.*, 19 Maine, 53; Smith v. Goodwin, 2 Greenleaf 175; Gray v. Holdship, 17 Serg. & Rawle, 413. This question has also been authoritatively settled in this state, in Allison v. McCune, 15 Ohio, 726.

"The cases of the Commercial Bank of Lake Erie v. The Western Reserve Bank, 11 Ohio, 444; Nellons *et al.* v. Truax *et al.*, 6 Ohio St. 97, and Anketel and Wife v. Converse *et al.*, 17 Ohio St. 11, establish, as to purchasers of incumbered real estate, "that the several purchasers of incumbered property are liable to the payment of the lien upon it, according to the universal order of time in which they acquired ownership. The reasons urged for the adoption of this rule, in the cases cited, apply with equal force to cases of purchases of fixtures from mortgaged premises, and as we hold in this case, that the plaintiff, as vendor, can enforce the same remedies against purchasers of fixtures from his vendee, having notice of his rights under the contract of sale, the same rule will apply."

WASHINGTON LAW REPORTER, DECEMBER 22.

Certificates of Auditor of Late Board of Public Works of District of Columbia not Negotiable, nor are they Choses in Action.—Ballard Pavement Company v. Mandle, Supreme Court of District of Columbia, before Wyley, J., [Wash. Law Rep. 344]. The question involved in this case, according to the synopsis of the editor of the Washington Law Reporter, was the negotiability of the certificates issued to contractors by the auditor of the late board of public works. Plaintiffs, in February last, filed their bill to have the defendants enjoined from receiving certificates of the board of audit, in exchange for certain certificates of the auditor of the board of public works, which the plaintiffs had deposited with the defendannt, Mandle, as collateral security for the payment of the plaintiff's notes, and which Mandle had sold to *bona fide* purchasers before the maturity of the notes. The plaintiffs having recently obtained from the board of audit the names of the persons presenting the certificates thus fraudulently disposed of by Mandle, made them parties defendant to the suit by filing a supplemental bill. Application was then made for an injunction restraining the defendants, *pendente lite*, from receiving certificates of the board of audit in exchange for the certificates of the auditor of the board of public works in question.

As to the character of the certificates, Judge Wylie holds that they are not bonds of the district, nor obligations of any kind issued by its authority; that they are merely written statements made and signed by the auditor, showing that the contractors named possessed a valid claim against the District of Columbia of the amount specified, but not conclusive even as to this; that they do not amount to so much as a chose in action, not even to evidence of a chose in action, because it is the money due upon the contract, and not the paper used as evidence, which is the chose in action, the act of Congress making the certificates evidence before the board of audit gave them a character which they did not have at the time they were issued.

That a purchaser of the certificates, by assignment from the contractor, gains no more than if he had taken an assignment of the contractor's claims, without the certificates, which would be the assignment of a bare chose in action, and that the assignee of a chose in action, takes subject to all the equities which subsist against the assignor.

PITTSBURG LEGAL JOURNAL, DEC. 16.

Petition by Surety to Open Judgment and for Issue—Allegations Showing him Entitled to Discharge Must be Specific—Consideration for Promise of Delay—Agreement to Pay Interest After Note is Due—Release of Surety.—Smith v. House, Common Pleas of Washington County, Penn. [5. Pittsb. L. J. (N. S.) 65.]

1. In the petition by a surety on a judgment note for rule to open and for an issue, alleging an agreement and an extension obtained by the principal from the payee, without the knowledge or consent of the surety, the grounds of the relief asked for must be averred specifically as to the nature, terms and consideration of the alleged binding agreement.

2. Hartman v. Danner, 20 Pittsb. Legal Journal, 151, does not impugn the doctrine that an agreement to pay interest for a specified time to the holder after the note has become due, is a sufficient consideration for a promise of delay, and, if made without the knowledge and consent of the surety, will release him.

Constitutional Law—Construction of Provisions that no Act of the Legislature shall Contain more than one Subject, which shall be Expressed in the Title.—Allegheny County Home's Appeal, Supreme Court of Pennsylvania, October and November Terms, 1874. [5 Pittsb. L. S. (N. J.) 65].

By the act of April 15, 1867, the borough of Laurenceville, the townships of Pitt, Oakland, Collins, Liberty and Peebles, were taken from Allegheny county and annexed to the city of Pittsburgh, they being part of the poor district of Allegheny county, known as the "Allegheny County Home," and having an interest in the county Poor Farm, on the 25th of May, 1871, an act was passed entitled "An Act providing for an equitable division of property between Allegheny county and the city of Pittsburgh." The petition prayed for the appointment of three commissioners under this act to enquire, 1. The value of "The Allegheny County Home" property. 2. To ascertain the interest and share of said borough and townships in the property of the "Allegheny County Home" at the time of annexation, according to their population and taxable property, and the value of said share and interest. 3. To ascertain what sum should be paid by the Allegheny County Home to the guardians of the city poor.

To this petition "The County Home" objected that by the 3d Amendment of 1864 to the constitution of Pennsylvania, sec. 8, art. 11, it is provided: "No bill shall be passed by the legislature, containing more than one subject, which shall be clearly expressed in the title, except appropriation bills;" that the title to the act of May 25th, 1871, is "An Act providing for an equitable division of property between Allegheny county and city of Pittsburgh," while the said act contained two distinct subjects, viz.: the division of the property between "The Allegheny County Home" and "The Guardians of the Poor of the city of Pittsburgh," and also between "Allegheny County Home" and "The Guardians of the Poor of Allegheny City," neither of which objects is clearly expressed in the title—all three corporations being distinct from Allegheny county and city of Pittsburgh; and that the Act of May 25th, 1871, was hence unconstitutional. These objections the Supreme Court overruled, and in doing so used the following language:

"The course of decision in this court has been intended to carry out the true intent of the amendment of 1864, as to the title and subject of bills, instead of resorting to sharp criticism, which must often bring legislation to nought. The amendment of 1864 was in substance proposed in the constitutional convention of 1837-8, and rejected because it was feared it would

render legislation too difficult and uncertain, and lead to litigation. It will not do, therefore, to impale the legislation of the state upon the sharp point of criticism, but we must give each title, as it comes before us, a reasonable interpretation, *ut res magis valeat quam pereat.* If the title fairly gives notice of the subject of the act, so as reasonably to lead to an enquiry into the body of the bill, it is all that is necessary. It need not be an index to the contents, as has often been said. But on the other hand it should not mislead or tend to avert enquiry into the contents, as was held in the case of The Union Passenger Railway Co., decided at Philadelphia in 1873. In view of this current of decision we cannot say that this title is too vague or is misleading. It substantially, though without particularity, describes the subject of the act and its purpose."

Vendor and Vendee—Parol Agreement that Vendor shall Convey to a Third Person the Land in case he pays the Purchase Money—Mortgage—Statute of Frauds.—Payne v. Patterson, Supreme Court of Pennsylvania, October and November Terms, 1874. [5 Pittsb. L. J. (N. S.) 66.] McClane, the owner of land, and Patterson who was about to become the vendee and receive a deed therefor, agreed by parol with Payne, that if he (Payne) paid the amount of the purchase-money and interest, Patterson should convey to him. In an action by Payne to recover a portion of the money received by Patterson on a subsequent sale of the land by him to Payne, to which the Statute of Frauds was pleaded, *Held*, that Patterson held the land neither as a trustee nor as a mortagee.

Upon the question whether the transaction made Patterson a mortagee, the court said: "It will be observed that there was no agreement to re-convey to McClane. It was that if Payne paid the amount of the purchase-money and interest, Patterson should convey to him. It was not conditional between the grantor and grantee. Under no circumstance was it to revert to the grantor. It was not conditional with the only person who had any interest to convey. It was not a mortagage as to McClane, and could not be as to Payne, to whom no *return* could be made. A mortgage is a defeasible deed. The defeasance is essential to the creation of every mortgage, whether it be evidenced by writing in, or separate from, the mortgage, or whether it be established by parol, it must nevertheless exist. The conditional right of restoration in the mortgagor must have been created. Without a valid agreement which binds the grantee to reconvey or yield up to the grantor when the conditions shall have been performed, it lacks the elements essentially necessary to make it a mortgage. This is fatal to the plaintiff's case. Pennsylvania Life Insurance Company v. Austin, 6 Wright, 257. The case of Maffitt's Adm'rs v. Rynd *et al*, 19 P. F. Smith, 380, is not in conflict with this view. The foundation of the right of action in that case rested on a written agreement by which the money was raised for the purchase of the land in question for the use of Lamb. It expressly provided that on the payment of the advances and the other indebtedness from Lamb to them, they would convey to Lamb's wife. Maffitt & Old took a conveyance of the land with full knowledge of this agreement, and under a promise to carry it out in good faith."

Legal News and Notes.

—WE learn from an authentic source that the new rules in bankruptcy will be promulgated by the judges of the supreme court on Monday next.

—HON. CHAS. W. TANKERSLEY, formerly speaker of the house at Little Rock, Ark., has removed to Denver, Col., and engaged in the practice of law n that city. We wish him much success in his new field of operations.

—KING KALAKAUA does something smack. He has a kind of taste. On his first theatrical nlght in New York city, it was arranged that he should attend Booth's theater, but he betook himself to the Black Crook.

—SOME time since we acquainted our readers with the fact, that Dr. Kenealy had been "disbenched" by his brethren of Gray's Inn, and deprived of his dinner. We omitted to state, however, while it was a matter of news, that he had been disbarred.

—GEN. LESLIE COMBS, of Kentucky, was recently summoned to recognize the handwriting of a Mr. Sudduth, who was a surveyor of sixty years ago. He knew the man and knew the handwriting. The case will probably be decided by his testimony. The case involves some 3,500 acres of land adjacent to the Blue Grass region.

—IT IS time for some enterprising legal author to write a book on the law of mother-in-laws. Here is a fresh item: An Indianapolis mother-in-law pursuaded her daughter to quit her husband and get a divorce from him. The husband brought suit against the mother-in-law for forty thousand dollars damages, and a jury have awarded him five hundred. If the mother-in-law had been young and good looking he wouldn't have got anything. But the verdict affected the divorced wife more than the mother-in-law. The latter hearing of it, became insane.

—SOME young lawyers and law students in New York city, have organized what is called "The Commonwealth," a society for improvement in legislative and forensic debate. It has two departments; the one judicial, the other, legislative. The former consists of a court with judges and other officers; the latter, of a legislature, with the proper officers. The editor of the Daily Register has been chiefly instrumental in its organization.

—BOTH Count Von Arnim and the Public Prosecutor are dissatisfied with the judgment of the court, and have appealed to the Kammergericht. Meantime, it having transpired that some enterprising newspaper man got hold of the twenty lithographed pages which embraced the judgment of the court before it was published, Herr Reich, president of the court, has been "disciplined." And yet some people say America is not a free country.

—HON. FULTON ANDERSON, of Mississippi, died in Baltimore during the night of the 27th ult., of general paralysis, after a protracted illness of five years. Mr. Anderson ranked as a jurist with the Prentisses, the Yergers, the Poindexters, the Sharkeys and the Gaines, who elevated the bar of Mississippi to a high point of excellence. In early life he married the eldest daughter of the late Hon. George S. Yerger, known throughout the country as the "great and good layman." He was the son of the late William E. Anderson, a distinguished jurist of Tennessee. He died in the fifty-first year of hi age.—[*New York Herald.*]

—IT will be remembered that the Court of Appeals of New York, decided in the Tilton-Beecher case that the granting or refusing of a bill of particulars, in an action for criminal conversation, is a matter of discretion with the trial court. Whereupon Mr. Beecher's counsel renewed their application, and an order for a bill of particulars was granted by Judge McCue of the Brooklyn City Court, in which the suit is pending. This order has now been reversed by Judges Neilson and Reynolds, on the ground, as we understand it, that it was too particular. Meantime Tilton cannot understand what Beecher is driving at; for Tilton thinks Beecher is the man that knows all the particulars. The trial is now in progress.

—SOME two years ago Carl Vogt, a subject of the King of Prussia, committed a heinous murder in Belgium, and fled to the United States. At that time there was no extradition treaty between our government and Belgium, but his surrender was demanded by the government of Prussia, on the ground that it had the right to bring back to its own territory one of its subjects who was charged with having committed a crime in any part of the world. To this demand our government refused to accede. Since that time a treaty of extradition has been established between the United States and Belgium, and now Vogt is again arrested and his extradition demanded under this treaty. Out of this demand grows the important question, which may have to be determined by our Department of State, or possibly, by some of our State or Federal judges under a writ of *hapeas corpus*, whether treaties of the United States are "laws" within the meaning of the prohibition of the constitution of the United States against the passage of *ex post facto* laws. If so, a treaty of extradition with a foreign power, is, so far as it operates retrospectively upon crimes already committed, null and void. The question is one of great interest, and the profession would, doubtless, much rather see it determined by an able federal judge than by the secretary of state under the advice of the present attorney-general.

—IN the American reports there are a number of criminal cases which discuss the order in which counsel shall address the jury, and the right of final reply. In the German court which has just tried Count Von Arnim, they have this curious custom: The public prosecutor makes immediate reply to each of the separate speeches for the defence. Such an officer must needs be a ready orator to encounter in detail the powerful talent which a rich and distinguished prisoner could summon to his aid. Thus, among Von Arnim's counsel was Herr Von Holtzendorff, the famous professor of law at Munich, who spoke for two hours with great vigor and acumen; and also Herr Dockhorn, whose rare talents had led to his being brought all the way from Posen to take part in this great trial. Herr Dockhorn must have been a hard man to grapple with in off-hand debate; for, in describing the commencement of his speech, it is said that he "got into the saddle like a Cossack breaking forth in the rear of heavy professional artillery." When Hannibal bivouaced with his army under the walls of Rome, the senate sent a messenger to inform him that the ground on which he had pitched his tent, had been that day sold at auction. With the same sublime assurance, Herr Dockhorn commenced his speech, as follows: "The professor having dug the trenches with wonderful effect, I am going to burn some of the outlying forts of the public prosecutor. The moment those forts are down, we shall perceive that the main points of the charge, which I may compare to the citadel, are nothing but painted sidescenes, and have no reality at all." Herr Tessendorff, the public prosecutor, seems to have done himself great credit by the self-possession and disciplined logic with which he met those great antagonists.